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No. 87-.....

In The

Supreme Court of the United States

October Term, 1987

LUIS O. JUARBE ANGUEIRA,

Petitioner,

v.

LUIS RAFAEL ARIAS, DIRECTOR OF THE PUBLIC BUILDING AUTHORITY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an opinion by the Supreme Court of Puerto Rico reiterated in four different occasions by the same Supreme Court of Puerto Rico and in one occasion by the Federal District Court for the District of Puerto Rico is a "clearly established law" and therefore, the defendant is not entitled to "qualified immunity".

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PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the Court of Appeals was entered on September 29, 1987 and appears reprinted in Appendix A at page App. 1. The District Court Opinion appears reprinted in Appendix B at page App. 17.

JURISDICTION

The jurisdiction of the court is invoked under 28 U.S.C. 1254(1), 28 U.S.C. 2101(c) and Rule 17.1(e) of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides that:

> "Congress shall make no law respecting establishment of religion, or prohibiting the free exercise thereof 'or abridging the freedom of speech' or of the press' or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

The First Amendment applies to the commonwealth of Puerto Rico through either the Fifth or the Fourteenth Amendments.

STATEMENT OF THE CASE

Puerto Rico public employees are protected by a merit system law (3 L.P.R.A., 1311). All the government employees are divided by law in two categories: career and confidential (3 L.P.R.A., 1349). For practical reasons almost all the different departments of the government of Puerto Rico have divided the island in regions and the agency or department of the government is directed at the regional level by a government employee whose position is classified as confidential, and that is called *Regional Director.*

As a result of the 1976 elections held in Puerto Rico, several regional directors of different agencies or departments were dismissed from their positions solely because the new elected government thought that since the Regional Director position was confidential and participates in the agency policy making process, he could be dismissed at will.

One of those Regional Directors filed a claim in the Court of Puerto Rico alleging that such dismissal was mainly due to his political affiliation, and it was a violation of his protected constitutional rights under *Branti v. Finkel,* 445 U.S. 507 (1980).

The Superior Court of Aguadilla, Puerto Rico found that the Regional Director dismissal was mainly due to his political affiliation and applied the rule laid down by the United States Supreme Court in *Branti,* and concluded that the dismissal was null.

On March 31, 1982, the Supreme Court of Puerto Rico decided that the Superior Court decision was correct,

Ramos v. Secretary of Commerce, 112 D.P.R. 514, Appendix C at page App. 39, and on October 12, 1982 a petition for writ of certiorari before the United States Supreme Court was denied. *Secretary of Commerce of Puerto Rico v. Arturo Ramos Villanueva*, 459 U.S. 908, 74 L. Ed. 2d 169.

On May 12, 1982 the Supreme Court of Puerto Rico decided another case of confidential employee, based on *Branti v. Finkel*, supra, the employee was entitled to her confidential position if the dismissal was based on politico-partisan reasons, unless the government could show that political affiliation was an adequate requirement for the effective discharge of her duties. *Carmen I. Diaz de Llovet v. Office of the Governor*, 112 D.P.R. 747 (1982).

On June 29, 1982 the Supreme Court of Puerto Rico decided another case of a confidential employee. The Supreme Court of Puerto Rico reiterated *Ramos v. Secretary of Commerce's Opinion*. A discharge of a confidential employee for political affiliation was invalid. *Franco v. Municipality of Cidra*, 113 D.P.R. 260 (1982).

On November 8, 1984 the Supreme Court of Puerto Rico decided another case of a Regional Director and applied the *Branti v. Finkel* doctrine in deciding that the Regional Director discharge was invalid. *Clemente Gonzalez v. Department of Housing*, 114 D.P.R. 763 (1983).

On June 4, 1984 the Supreme Court of Puerto Rico decided another case of confidential employees, this time in favor of three Regional Directors. The Opinion was the same as the one previously cited, the discharge was invalid. *Colon v. C.R.U.V.*, 115 D.P.R. 503 (1984).

On February 25, 1985, the United States District Court for the District of Puerto Rico decided their first

case of a Regional Director. The District Court, Laffite J., held that under both Puerto Rico and United States constitutions, public employees of trust and confidence are constitutionally protected from political discrimination; thus public employees were entitled to reinstatement.

On March 15, 1985, petitioner Luis O. Juarbe Angueira was discharged from his position as Regional Director. He was a Regional Director in the Region of Aguadilla, which is the same region of the *Ramos v. Secretary of Commerce* case, although a different agency, this time the Public Buildings Administration.

Petitioner filed a claim in the Federal District Court for the District of Puerto Rico under 42 U.S.C. 1983. Defendant filed a motion for summary judgment on qualified immunity. The District Court denied the motion (Appendix B). The Court of Appeal for the First Circuit reversed the District Court Opinion and said that "the law in respect to the dismissal viewed as of March 1985 was unclear. That is, as of that time, one could not say that the dismissal was clearly unlawful". (Appendix A).

REASONS FOR GRANTING THE WRIT

At the time of the dismissal the law was clear that a confidential employee, a Regional Director, could not be dismissed from his position because of his political affiliation.

In *Bonitz v. Fair* the United States Court of Appeals for the First Circuit said:

"The Mitchell Court carefully circumscribes the role of the appellate court. We are not to 'consider the correctness of the plaintiff's facts, nor even determine whether the plaintiff allegations actually state a claim'. *Mitchell v. Forsyth,* 472 U.S. 511, 105 S. Ct. 2806, 2816, 86 L. Ed. 2d 411 (1985). Instead the issue before us is purely legal: 'Whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions'." *Bonitz v. Fair,* 804 Fed. 2d 164, 166 (1986).

This standard set forth by the first circuit in *Bonitz* seems to be different from the one applied by the same court in cases that have to do with Puerto Rico discharged cases. In his dissident opinion on *Raffucci Alvarado v. Sonia Zayas,* 816 F. 2d 818 (1987), Judge Torruellas said:

"Furthermore, this court continues to apply a different standard in Puerto Rico political discharge cases, in determining what is 'clearly established law' that it does in other civil cases . . ."

In *Hall v. Oca,* 817 F. 2d 920 (1st Cir. 1987), the Court said:

"Since a reasonable public official is expected to know the law, our inquiry is nothing more than an examination whether the events of October 26, 1980, violated 'clearly established . . . constitutional rights'."

In *Juarbe Angueira,* the First Circuit said:

"Of course, as we have recognized, the Supreme Court of Puerto Rico held in 1982, and 1984, that many upper level government jobs fall outside Branti's 'political exception.' But as we have also said, the case based on Puerto Rico law and go(ing) further thus 'most other court interpretations of *Elrod/Branti* "are not conclusive as to the state of the Law." ' "

Juarbe Angueira v. Arias, 86-2012, 1st Cir. September 29, 1987 (Appendix B).

Judge Torruellas, in his dissenting opinion said:

> "As applied, this Ad-Hoc non-standard suggests that the law is unsettled until the position itself, that is, Regional Director of the P.B.A. for the Region of Aguadilla, has been litigated before the *Federal* Courts. Even this court has been unwilling to go that far in other civil rights cases."

In *Anderson v. Arlington,* 55 U.S.L.W. 5092 (June 25, 1987) the United States Supreme Court, Justice Scalia, delivering the opinion of the court, said:

> "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing cause the unlawfulness must be apparent."

In actions where Regional Directors working for the government of Puerto Rico, claim that they have been dismissed in violation of their constitutional rights, only the Supreme Court of Puerto Rico or the District Court of Puerto Rico can render opinions. How can the Court of Appeals request that,

> "The *particular* position at issue, in light of the responsibilities inherent in those positions, were constitutionally protected from patronage dismissal," and at the same time to say that the Supreme Court of Puerto Rico is deciding that 'upper level governmental jobs fall outside *Branti* "political exception . . . go

further than most other court interpretation of *Elrod/Branti.*" ' "

As of today, no case has been decided by the Supreme Court of Puerto Rico vacating the law as established in *Ramos v. Secretary of Commerce, Franco v. Municipality of Cidra, Clemente Gonzalez v. Department of Housing,* and *Colon v. Urban Renewal and Housing Corporation.*

The only case decided by the District Court for the District of Puerto Rico prior to the dismissal of the petitioner was reversed by the Court of Appeals on December 18, 1986, *Rodriguez v. Munoz,* 808 F. 2d 138 (1st Cir. 1986).

In the *Rodriguez* Opinion, and in reference to the Opinion of the Supreme Court of Puerto Rico, the Court of Appeals says:

> "While these decisions should be considered for their persuasive effect, they are not conclusive as to the state of the law when Rodriguez was fired. As pointed out in our recent en banc determination, they go further than do most circuit and District Court interpretations of *Elrod-Branti* in refusing to allow political firings at the higher levels of government. *Jimenez Fuentes v. Torres Gastambide,* 803 F. 2d, at 7 N.9 (En Banc).
>
> "Moreover, as neither *Colon* nor *Clemente Gonzalez* had been decided by the time of plaintiff's dismissal in March 1983, they are irrelevant in determining whether defendant was objectively reasonable in thinking that, *at the time of the discharge,* he could lawfully discharge Rodriguez. *Ramos,* to be sure, had been decided by then, but standing alone, was a far less clear signal as to the Puerto Rico Court's probable view of the present situation."

At the time the petitioner Juarbe Angueira was dismissed, Ramos was not standing alone. By the time Juarbe Angueira was dismissed, not only was the Ramos' Puerto Rico Supreme Court decision, but also the United States Supreme Court had denied a Certiorari on Ramos. Four other Puerto Rico Supreme Court decisions and one Federal District Court opinion had been issued.

On page 8 of the Slip Opinion of the Juarbe Angueira Opinion, in reference to the classification of "trust" or "confidence" of the position, the Court of Appeals goes on to say:

> "We have said that the 'legislatures classification system' does not determine 'the Elrod Branti question', but we have also said 'it is entitled to some deference'."

But in *Branti,* the United States Supreme Court said:

> "In sum, the ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved."

If the Puerto Rico Legislature is entitled to some deference when it classifies the position of Regional Directors as confidential, (and as a matter of fact, petitioner position is not classified by the legislature as confidential, this is done by the agency, the legislature only decides how many positions in the different government agencies can be classified as confidential), why could not the Supreme Court of Puerto Rico be entitled to the same deference when it decides to fully embrace *Branti* in all its opinions that had to do with Regional Directors?

Pondering all the above court decisions, I do not believe it can be seriously contended that at the time of the discharge of the petitioner (March 1985), the *Branti* standard was not a clearly established law and was not known by any reasonable government executive in Puerto Rico.

Prior to the dismissal of the petitioner, all the opinions of all the judicial bodies that had rendered opinions as to the positions of Regional Directors had said that political affiliation was not a proper requirement for the effective performance of the position.

After the dismissal of the petitioner, all the judicial bodies that have reached opinions as to the positions of Regional Director have decided that political affiliation was not a proper requirement for the effective performance of the position, until the opinion en banc of the First Circuit of September 19, 1986 in *Jimenez Fuentes v. Torres Gaztambide,* 807 F. 2d 236 (1st Cir. 1986).

When the Court of Appeals decided *Jimenez Fuentes v. Torres Gaztambide,* it said that in deciding if a particular position falls or not outside of *Branti,* the inquiry to be made was:

FIRST—Whether the position relates to partisan political interest or concerns;

SECOND—to examine the particular responsibilities of the position to determine whether it resembles a policy maker, a privy to confidential information, a communicator or some other office holder whose function is such that party affiliation is an equally appropriate requirement.

The District Court, in denying the Motion for Summary Judgment based on Qualified Immunity filed by the

defendant, not only said that "defendants allegations, to the unsettled state of the law at the time of plaintiff dismissal is without merit", it also evaluates the need for political affiliation following the "threshold inquiry imposed by the Court of Appeals in *Jimenez Fuentes*".

The District Court's Opinion makes a full inquiry as to the effect of partisan politics on the agency function and on the duties and responsibilities of the Regional Director, and concludes that plaintiffs dismissal based on his party membership does not fall within the political affiliation exceptions to patronage dismissal.

> "We therefore feel that a reasonable competent official should have known that political affiliation was not an appropriate requirement for the position of PBA Regional Director, and that a discharge for political reasons would violate the First Amendment."

A clear and well established principle of law is that the District Court's finding of facts must stand unless it is "clearly wrong". In *Jimenez Fuentes,* the Court of Appeals established the guideline for the District Court to follow. In *Juarbe Angueira* (petitioner), the District Court followed those guidelines. The Court of Appeals now says that a petitioner's job *is* one of "at least" "potentially" concerned matters of partisan political interest and involves at least a "modicum" of policy making responsibility . . . "

In *Anderson v. City of Bessmer City, N.C.,* 470 U.S. 564, 105 S. Ct. 1504 (1985) the United States Supreme Court said:

> " . . . If the district court's account of the evidence is plausible in light of the record reviewed in

> its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. *Where there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous.* This is so even when the district court's findings do not rest on credibility determination, but are based instead on physical or documentary evidence or inferences from other facts. . . . Rule 52 does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a court of appeals to accept a district court's finding unless clearly erroneous''.

For Qualified Immunity to prosper the rule is—did defendant conduct violate clearly established statutory or constitutional rights of which a reasonable person should have known of *at the time of the alleged* violation. *Creighton v. City of St. Paul,* 766 F. 2d 1269, 1277 (8th Cir. 1985). We sustained that on March 15, 1985 (day of the dismissal of the petitioner) the law was, clearly established as to the unlawfulness of the defendants action, because it was the same law established by the Supreme Court of Puerto Rico and by the Federal District Court of Puerto Rico. Ever since the First Circuit's opinion, there are two laws. Defendant cannot claim that this anomaly was going to occur, since "the official cannot be expected to predict the future course of constitutional law." *Procumir v. Nansuth,* 434 U.S. 555, 562 (1978). Therefore, the success of a civil rights' claim filed by a Regional Director that has been dismissed because of political reasons will depend on whether he files his civil action in the state court or in the federal court.

This double standard, as Judge Torruellas calls it, of the first circuit in cases of civil rights when applied to

Puerto Rico, is not justice. That there be two different laws for the same constitutional rights violation claim is not justice.

———o———

CONCLUSION

For justice we pray so that the cherished First Amendment right of petitioner be protected in the federal courts as it has been protected under *Branti* in the Puerto Rico Supreme Court.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 86-2012

LUIS O. JUARBE-ANGUEIRA,

Plaintiff, Appellee,

v.

LUIS RAFAEL ARIAS, DIRECTOR OF THE PUBLIC BUILDING AUTHORITY,

Defendant, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

[Hon. Hector M. Laffitte, *U.S. District Judge*]

Before
Bownes, Breyer and Torruella,
Circuit Judges.

Marcos A. Ramirez-Lavandero with whom *Hon. Hector Rivera Cruz,* Secretary of Justice, *Marcos A. Ramirez Irrizarry* and *Ramirez & Ramirez* were on the brief for appellant.

Israel Roldan Gonzalez for appellee.

September 29, 1987

BREYER, *Circuit Judge.* In March 1985, the Director of the Public Building Authority of the Commonwealth of Puerto Rico (the "PBA Director") dismissed Luis Juarbe Angueira from his job as the PBA's Regional Director for the Aguadilla Region. Juarbe Angueira subsequently brought suit, claiming that his dismissal violated the United States Constitution. He said that the PBA Director dismissed him because he was a member of the New Progressive Party (the "NPP") and that the First Amendment protected him from such a "politically based" discharge. *Branti v. Finkel,* 445 U.S. 507 (1980); *Elrod v. Burns,* 427 U.S. 347 (1976). He asked the court both to order his restatement and to require the PBA Director to pay him damages.

The PBA director moved to dismiss the damage claim. He said that the dismissal either was legal or its illegality in early 1985 was, at the least, unclear and that he therefore possessed a "qualified immunity" protecting him from having to pay damages. *Harlow v. Fitzgerald,* 457 U.S. 800, 815-19 (1982); *Anderson v. Creighton,* 55 U.S.L.W. 5092, 5092-93 (U.S. June 25, 1987). The district court denied the PBA Director's motion to dismiss. The Director now appeals that interlocutory decision. *Mitchell v. Forsyth,* 472 U.S. 511 (1985) (denial of summary judgment on claim of qualified immunity appealable as a "final decision"); *De Abadia v. Izquierdo Mora,* 792 F.2d 1187, 1190 (1st Cir. 1986) (same even though damage claim is joined with claim for injunctive relief).

After examining the record in this case, we have concluded that the defendant is correct; he is entitled to "qualified immunity" in respect to the damage claim. We

rest our holding, however, on a narrow legal ground. If we assume purely for the sake of argument that Juarbe Angueira's dismissal was unlawful, even so, the law in respect to the dismissal, viewed as of March 1985, was unclear. That is, as of that time one could not say that the dismissal was *clearly* unlawful. And, only where the action in question is *clearly* unlawful does a defendant lose his qualified immunity. *See Harlow v. Fitzgerald,* 457 U.S. at 818. In deciding this appeal on this narrow ground, we express no view about whether the plaintiff is ultimately entitled to reinstatement.

I

This case raises no new, generally significant legal issues. We have previously considered the question of "qualified immunity" from damage liability in the context of a claim of "politically motivated discharge". *See Roman Melendez v. Inclan,* No. 86-1532, slip op. (1st Cir. Aug. 4, 1987); *Roure v. Hernandez Colon,* 827 F.2d 139 (1st Cir. 1987); *Quintana v. Anselmi,* 817 F.2d 891 (1st Cir. 1987); *Raffucci Alvarado v. Sonia Zayas,* 816 F.2d 818 (1st Cir. 1987); *Vazquez Rios v. Hernandez Colon,* 819 F.2d 319 (1st Cir. 1987); *Rosado v. Zayas,* 813 F.2d 1263 (1st Cir. 1987); *Mendez-Palou v. Rohena-Betancourt,* 813 F.2d 1255 (1st Cir. 1987); *Monge-Vazquez v. Rohena-Betancourt,* 813 F.2d 22 (1st Cir. 1987); *Cheveras Pacheco v. Rivera Gonzalez,* 809 F.2d 125 (1st Cir. 1987); *Rodriguez Rodriguez v. Munoz Munoz,* 808 F.2d 138 (1st Cir. 1986); *De Abadia v. Izquierdo Mora,* 792 F.2d 1187 (1st Cir. 1986. *See also Jimenez Fuentes v. Torres Gaztambide,* 807 F.2d 236 (1st Cir. 1986) (preliminary injunction claim), *cert. denied,* 107 S. Ct. 1888 (1987); and *De Choudens v.*

Government Development Bank, 801 F.2d 5 (1st Cir. 1986) (same), *cert. denied,* 107 S. Ct. 1886 (1987) (same). We have explained that public officials generally are entitled to "qualified immunity" from personal liability for those acts, taken in the course of their duties, that may have violated a party's constitutional rights *unless* the law defining those right was *"clearly established* in plaintiff's favor." *De Abadia,* 792 F.2d at 1193 (emphasis added); *see also Malley v. Briggs,* 475 U.S. 335, 341 (1986) (qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law"); *Harlow v. Fitzgerald,* 457 U.S. at 818 (officials are immune "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known"; the reasonableness "measured by reference to clearly established law . . . at the time an action occurred") (footnote omitted). And, we have said more specifically that a defendant faced with a political discharge claim enjoys qualified immunity unless, at the time of dismissal, "it was clearly established that employees in the *particular positions* at issue, in light of the responsibilities inherent in those positions, were [constitutionally] protected from patronage dismissal." *Mendez-Palou,* 813 F.2d at 1259 (emphasis in original). *See Anderson v. Creighton,* 55 U.S.L.W. at 5093 ("in the light of preexisting law the unlawfulness [of the particular act] must be apparent").

We have also pointed out that, for the most part, in early 1985, the law did not *clearly* forbid dismissals of those in "upper level" managerial-type government positions. Rather, the Supreme Court had then set forth the law in highly general terms. It is said that the Constitu-

tion provided protection from politically-based discharge to public employees *other than* those in jobs where "party affiliation is an appropriate requirement for the effective performance of the public office involved." *Branti*, 445 U.S. at 518. But, the Court did not specify just where "party affiliation" was, or was not, "appropriate." It was difficult to conclude with any certainty that "party affiliation" was *not* "an appropriate requirement for the effective performance" of most upper level government jobs. It was difficult to predict (in respect to these upper level jobs) just how the courts, in particular instances, would draw the line that the Supreme Court described in *Branti*—a line that seeks to separate instances where (1) a newly elected political party can legitimately replace those who hold important offices in order to carry out its electoral mandate and to provide voters with the confidence it is doing so (i.e., where a 'new broom' ought to 'sweep clean'), from (2) pure political patronage (i.e., 'jobs for the boys').

In fact, courts have been reluctant to define *Branti's* "political exception" too narrowly lest they prohibit newly elected officials from implementing new policies in areas that sound technical (antitrust, development banks, park services) but which, depending on time and circumstances, may become politically charged. *See Tomzcak v. City of Chicago*, 765 F.2d 633, 641 (7th Cir.), *cert. denied*, 106 S. Ct. 313 (1985). Lower courts (through 1985) applied *Branti's* exception broadly, finding First Amendment protection against politically based dismissals only for highly technical or very low level jobs, such as a road grader, a city court bailiff, a bookkeeper, a deputy court clerk, a deputy sheriff, or a supervisor of a branch of an auditor's

office. They explicitly denied protection to an assistant director of public information for a county, the first deputy commissioner of a department of water, the superintendent of employment for a Chicago park district, an assistant district attorney, a fee agent, a city solicitor and assistant solicitor, the state director of the Farmers Home Administration, and a deputy parks commissioner. *See* Appendix. There is nothing in these decisions, for example, that would suggest *Elrod* or *Branti* radically changed existing federal practice, a practice that permits Presidents to replace at will United States Attorneys, regional heads of the General Services Administration, up to 10 percent of the top agency Senior Executive Services positions, and many other holders of significant offices. Senate Comm. on Govt. Affairs, 98th Cong., 2d Sess., *Policy and Supporting Positions* 122, 201, 255 (Comm. Print 1984); 5 U.S.C. § 3134 (b) (1982).

Of course, as we have recognized, the Supreme Court of Puerto Rico held, in 1982, 1983 and 1984, that many upper level government jobs fall outside *Branti's* "political exception." But, as we have also said, those cases based on Puerto Rican law and "go[ing] further than" most other court interpretations of *Elrod/Branti,* "are not conclusive as to the state of the law." *Rodriguez Rodriguez,* 808 F.2d at 142.

Indeed, Puerto Rico's officials might have found upper-level job protection from political discharge particularly difficult to predict in light of Puerto Rico's own civil service system which classifies upper level jobs such as those in question here as "confidential" or "trust" positions, positions outside the career civil service. Com-

monwealth law permits the Central Office of Personnel Administration to exempt no more than 25 positions per agency from the career system, using as criteria whether the job involves "formulation of public policy," P.R. Laws Ann. tit. 3, §§ 1350, 1351(3) (1980 & Supp. 1986), or "[d]irect services to the head or subhead of the agency which requires a high degree of personal trust." P. R. Personnel Bylaws: Areas Essential to the Merit Principle, § 5.2 (1976). Appellants have told us that 3,729 employees out of 162,387 are in the "trust" or "confidence" service (of which the new Commonwealth government says it has dismissed or demoted approximately 600 persons, and, of these, 319 have brought suit). We have said that the "legislature's classification system" does not determine "the *Elrod/Branti* question," but we have also said "it is entitled to some deference." *Jimenez Fuentes,* 807 F.2d at 246.

The upshot is that defendants will normally enjoy qualified immunity from damage liability in upper-level, managerial-type job dismissal cases, cases where the jobs in questionnaire not purely technical or scientific in nature. This court said in *Mendez-Palou* that a defendant enjoys "qualified immunity" as long as the job in question "*potentially* concerned matters of partisan political interest and involved at least a *modicum* of policymaking responsibility, access to confidential information, *or* official communication." *Mendez-Palou,* 813 F.2d at 1259 (emphasis added). This legal standard governs the case before us.

II

As in *Jimenez Fuentes,* 807 F.2d at 243-46, and *Mendez-Palou,* 813 F.2d at 1260, we apply the legal standards

to the facts of the particular case only insofar as they are not in dispute. We find here no significant dispute in respect to those characteristics of the position of Regional Director that are set forth in a Job Classification Questionnaire sent to the Puerto Rico Personnel Office (for purposes of deciding whether the position is a "trust" position); the "position of trust" classification that the PBA prepared in 1976 and filed with the Director of the Central Office for the Administration of Personnel of the Commonwealth; and an organization chart that appears in the record. To be more specific, the particular matters that are undisputed and determine the outcome of this appeal are the following:

1. The statute creating the PBA defines its duties as "provid[ing] lodging facilities for the schools, 'Health and Social Welfare Facilities', offices, quarters, courts, warehouses, shops and other physical facilities of the Commonwealth, any department, agency, instrumentality or municipality." P.R. Laws Ann. tit. 22, § 903 (Supp. 1983).

2. The itemization of positions of trust prepared by the PBA defines the PBA Regional Director's responsibilities as follows:

> The Regional Directors have the responsibility for the administration, supervision, direction and inspection of the Authority's projects under construction. Therefore they coordinate, direct, supervise and inspect the activities comprised in all the construction cycle in [their] Region. Offer technical advise [sic] to the engineers in charge of the different projects. Are also responsible for the administration, supervision and direction of the maintenance and conservation services for the Authority's buildings in [their] region. The supervision phase also includes the ser-

> vice of contracts executed with other agencies and the Authority's Government Centers, as well as those which the Authority carries out with private companies. They also certify their payment. Also offer technical advise [sic] to the Auxiliary Executive Director in regard to the construction and conservation programs for the Authority's buildings in their respective regions. Are the official representatives of the Authority and its Executive Director in their regions in regards to the relationship to be established with municipal officers, other Government representatives and the general public.

Record Appendix at 7.

3. The classification questionnaire states that the Regional Director supervises 54 employees including two building administrators, two conservation supervisors, four clerical personnel employees, nine conservation technicians, and 37 conservation workers. Classification Questionnaire, Record Appendix at 11. It describes the director's duties as follows:

> Supervision and coordination of all work to be done in the conservation and maintenance phases of all of the buildings in the region (32 buildings).
>
> Direct and supervise the administrative tasks of the region in its phases of personnel relations, clerical work, requisitions and adquisition [sic] of materials and equipment, ect. [sic].
>
> Carry out any other related duty that is requested .... Prepare the functional yearly budget based on the existing needs in the region for the revision by the Conservation Department and final approval by the Administration Office and any other periodic report that may arise.

Record Appendix at 10.

4. The table of organization shows the regional offices under the "Auxiliary Executive Director for Operations" Area who, in turn, reports to the Office of the Executive Director, which is, in turn, responsible to the Board of Directors.

These facts indicate that the agency's mission is of a sort that might well involve the agency in the political process. Its duties, at the least, include responsibility for care and maintenance of public buildings throughout Puerto Rico, including schools, health facilities, and welfare facilities. Its responsibilities include not only custodial type work, but also the repair, reconstruction, and conservation of buildings. Where, how, and when the government will repair or reconstruct public buildings, which towns will have which priorities, when and where money is to be spent, may well be a matter of considerable interest to government officials including political leaders. Thus, the agency's mission is at least "*potentially*" one that concerns politically charged issues; and the job of an upper level general manager is "*potentially*" concerned with what "*potentially*" concerns the agency's mission.

Similarly, there is at least a "*modicum*" of "policy-making responsibility" in the Regional Director's job within the agency on subjects that could involve political issues. He supervises 54 others; his is a moderately high-level position within the agency; he directs the "Authority's projects under construction"; he is the "official representative[]" of the "Authority and its Executive Director" in the region "in regards to relations with municipal officers, other Government representatives and the general public." He prepares a budget for the region,

a matter likely to be of considerable interest to the elected and other government officials who work there.

These factors, at least "*potentially*" make the Regional Director's job significantly different in respect to political involvement from those that courts have held constitutionally protected, i.e., road grader, city court bailiff, bookkeeper, deputy court clerk, deputy sheriff, supervisor of a branch of an auditor's office, *see* Appendix, waiters, cleaning people, and a director of domestic services, *see Vazquez Rios, supra.* The enumerated factors make the job somewhat more like those in which we have held "qualified immunity" exists. *Roure v. Hernandez Colon, supra* (translator); *Quintana v. Anselmi, supra* (Regional Director for Right to Employment Administration); *Raffucci Alvarado v. Sonia Zayas, supra* (Social Services Secretary); *Vazquez Rios v. Hernandez Colon, supra* (editing assistant in governor's press office; Executive Secretary in Office of Cultural Affairs); *Rosado v. Zayas, supra* (Regional Director, Department of Social Services; Director of Bureau of Statistics, Economic and Social Planning Program of Planning Board; Director of Bureau for Consultation on Land Use, Physical Planning Program of Planning Board); *Mendez-Palou v. Rohena-Betancourt, supra* (Director of Administration for Environmental Quality Board; Assistant Secretary for Special Services, Department of Agriculture; Deputy Executive Director for Special Affairs, Aqueduct and Sewer Authority); *Monge-Vazquez v. Rohena-Betancourt, supra* (Director of Office of Education and Community Relations, Environmental Quality Board; Regional Director, Department of Natural Resources); *Rodriguez Rodriguez v. Munoz Munoz, supra* (Regional Director of Right to Work Administration);

De Abadia v. Izquierdo Mora, supra (Executive Director of Quality Control Program); *cf. De Choudens,* 801 F.2d at 10 (no abuse of discretion to grant *preliminary injunction* where evidence shows job is "essentially a provider of accounting services and technical, financial information" (quoting district court) but this court recognizes "closeness of a case involving the political firing of a top policymaking official").

Since the undisputed job descriptions indicate a job that at least "potentially" concerned matters of partisan political interest and involved at least a "modicum" of policy making responsibility, the defendant is entitled to "qualified immunity". *Mendez-Palou,* 813 F.2d at 1259. As we previously pointed out, however, we express no view about whether this position of "Regional Director" (after trial in respect to reinstatement) will turn out to fall outside, or within, *Elrod/Branti*'s exception. The judgment of the district court in respect to the issue of qualified immunity is

Reversed.

APPENDIX

The cases in which the courts have held there is constitutional protection include: *Meeks v. Grimes,* 779 F.2d 417 (7th Cir. 1985) (city court bailiff); *Horton v. Taylor,* 767 F.2d 471 (8th Cir. 1985) (road grader); *Grossart v. Dinaso,* 758 F.2d 1221 (7th Cir. 1985) (bookkeeper); *Barnes v. Bosley,* 745 F.2d 501 (8th Cir. 1984) (deputy court clerk, *cert. denied,* 471 U.S. 1017 (1985); *Jones v. Dodson,* 727 F.2d 1329 (4th Cir. 1984) (deputy sheriff); *DeLaCruz v. Pruitt,* 590 F. Supp. 1296 (N.D. Ind. 1984) (supervisor of branch of auditor's office).

The cases in which the courts have found no constitutional protection (as of 1985) include: *Brown v. Trench,* 787 F.2d 167 (3d Cir. 1986) (county's assistant director of public information); *Tomczak v. City of Chicago,* 765 F.2d 633 (7th Cir.) (first deputy commissioner of department of water), *cert. denied,* 106 S. Ct. 313 (1985); *Shakman v. Democratic Organization of Cook County,* 722 F.2d 1307 (7th Cir.) (superintendent of employment for Chicago park district), *cert. denied,* 464 U.S. 916 (1983); *Livas v. Petka,* 711 F.2d 798 (7th Cir. 1983) (assistant state's attorney); *Mummau v. Ranck,* 687 F.2d 9 (3d Cir. 1982) (per curiam) (assistant district attorney); *Sweeney v. Bond,* 669 F.2d 542 (8th Cir.) (fee agents), *cert. denied,* 459 U.S. 878 (1982); *Ness v. Marshall,* 660 F.2d 517 (3d Cir. 1981 (city solicitor and assistant solicitor); *Nekolny v. Painter,* 653 F.2d 1164 (7th Cir. 1981) (question of fact whether senior citizens' coordinator was policymaker), *cert. denied,* 455 U.S. 1021 (1982); *Committee to Protect the First Amendment Rights of Employees of the Department of Agriculture v. Bergland,* 626 F.2d 875 (D.C. Cir. 1979) (state directors of Farmers Home Administration, state executive directors of Agricultural Stabilization and Conservation Service) (pre-Branti), *cert. denied,* 447 U.S. 921 (1980); *Ecker v. Cohalan,* 542 F. Supp. 896 (E.D.N.Y. 1982) (deputy park commissioner); *Brunton v. United States,* 518 F. Supp. 223 (S.D. Ohio 1981) (state director of Farmers Home Administration).

TORRUELLA, *Circuit Judge* (Dissenting). I continue to adhere by my views expressed in *Perez Quintana v. Gracia Anselmi,* 817 F.2d 891, 893 (1st Cir. 1987) (dissenting); *Rosado v. Zayas,* 813 F.2d 1263, 1267 (1st Cir.

1987) (same); and in *Jimenez Fuentes v. Torres Gaztambide,* 807 F.2d 236, 248 (1st Cir. 1986), *cert. denied,* 55 U.S.L.W. 3711 (1987) (same).

The majority finds today that the function of the Public Buildings Authority ("PBA") is "at least potentially" one that concerns partisan politics, and that the job of Regional Director involves "at least a modicum of policy making responsibility." Because the majority concludes that plaintiff's discharge in 1985 did not violate "clearly established" law, defendant is immune from a Section 1983 damages action. *See ante* at 5, quoting *Mendez Palou,* 813 F.2d at 1259 (a defendant enjoys qualified immunity unless it was clearly established that employees in the *particular position* at issue . . . were constitutionally protected).

I have objected before that this watered-down version of *Branti* creates a "dragnet from which no governmental position can escape," precisely because "[p]oliticians can *potentially* disagree on anything and everything." *Rosado,* 813 F.2d at 1268. As applied, this ad-hoc non-standard suggests that the law is unsettled until the position itself, that is, Regional Director of the PBA for the Aguadilla Region, has been litigated before the *federal* courts. Even this court has been unwilling to go that far in other civil rights cases. In fact the Supreme Court recently ruled otherwise. *See Anderson v. Creighton,* 55 U.S.L.W. 5092 (June 25, 1987); *Hall v. Ochs,* 817 F.2d 920 (1st Cir. 1987). In *Anderson* the Court, in particularizing the meaning of "clearly established" law, found:

> The contours of the right must be sufficiently clear that a reasonable official would understand that what

> he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but is to say that in the light of preexisting law the unlawfulness must be apparent.

55 U.S.L.W. at 5093.

Of course, if it was "clearly established" at the time that certain *domestic* employees performing ministerial duties could not be fired for political reasons, *Vazquez Rios v. Hernandez Colon,* 815 F.2d 830 (1st Cir. 1987), the illegality of the discharge in this case, too, should have been *apparent* in 1985. The PBA's main function is to maintain and to renovate the public infrastructure. The agency is analogous to a janitorial service company in the private sector whose functions do not stimulate political discord. And the defendant has not met the burden of proving that the Regional Director position, as manager of Puerto Rico's public janitors, is one requiring political affiliation for its effective performance. The uncontroverted facts upon which the majority relies show that the Regional Director offers "technical advice" in regards to the construction and conservation of projects within the region and oversees the execution of contracts with other government agencies. *See ante* at 10. Regardless of his bombastic title and minimal supervisory responsibilities, the duties of this job are measured strictly by technical or professional criteria, much like the administrative technocrat in *de Choudens v. Government Development Bank,* 801 F.2d 5 (1st Cir. 1986), *cert. denied,* 55 U.S.L.W. (1987), for whom no party affiliation is prescribed. When I compare the work performed by the present appellant

with that in *de Choudens* in which we refused to allow partisan political considerations to prevail as applied to a senior vice-president of the Government Development Bank, I cannot but conclude that we are but one small step away from openly reversing not only that decision but also *Branti*.

I respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

LUIS O. JUARBE ANGUEIRA, Plaintiff, v. LUIS RAFAEL ARIAS, Director of the Public Building Authority, Defendant.	)	CIVIL NO. 85-995 HL

OPINION AND ORDER

(Filed October 21, 1986)

Plaintiff, Luis O. Juarbe Angueira, has brought this action for damages, declaratory relief, and injunctive relief against defendant Luis Rafael Arias, individually and in his official capacity as Director of the Public Building Authority (hereinafter "PBA") pursuant to 42 U.S.C. sect. 1983. Plaintiff alleges a cause of action under the First, Fifth, and Fourteenth Amendments of the U.S. Constitution for his discharge on March 15, 1985 from the position of Regional Director of the Public Building Authority for the region of Aguadilla. It is plaintiff's contention that his discharge from employment was motivated solely by his political affiliation, and therefore constitues a violation of his constitutional and statutory rights.

Defendant, in turn, has raised an affirmative defense of qualified immunity, and has filed a Motion for Summary Judgment and concurrent Request for Stay of discovery based upon this asserted defense. After considering defendant's moving papers, plaintiff's response in opposition, and the separately submitted compendium of translated exhibits, this Court finds that both the Motion for Summary Judgment and Request for Stay of proceedings should be DENIED.

I. FACTUAL BACKGROUND

Plaintiff alleges that he is a member of the New Progressive Party (hereinafter "NPP"), and that defendant belongs to the Popular Democratic Party (hereinafter "PDP"). The PDP prevailed over the NPP in the general election of November 6, 1984, and was inaugurated into office on January 2, 1985. Defendant Luis Rafael Arias was subsequently appointed Director of the Public Building Authority (hereinafter "PBA"), an agency of the Commonwealth charged with providing and maintaining lodging facilities for the various departments, offices, and municipalities of the government. Approximately three months after defendant's appointment to office, on March 15, 1985, plaintiff was discharged from his post as Regional Director of Aguadilla. The office of Regional Director is classified as a position of "trust and confidence" under the Puerto Rico Public Service Personnel Act, 3 L.P.R.A. section 1349 *et seq.*

Plaintiff had been employed in the capacity of Regional Director was occupied by Mr. Javier Soto Cardona, who is a member of and active in the affairs of the PDP. Plaintiff alleges, on information and belief, that the sole

reason for termination of his employment was due to his political affiliation with the NPP.

Defendant Luis Rafael Arias now moves for summary judgment. In considering his motion, this Court notes that an award of summary judgment is proper only when it is shown on the pleadings and other evidence in the record that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), Fed.R.Civ.P. To determine whether summary judgment is appropriate, the Court must look at the record "in light most favorable to . . . the party opposing the motion." POLLER v. COLUMBIA BROADCASTING SYSTEM, INC., 369 U.S. 464,473 (1962). In a patronage dismissal action, summary judgment may properly be granted even in the initial stages of the suit; "unless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery." MITCHELL v. FORSYTHE, — U.S. —, 105 S.Ct. 2806,2808, 86 L.Ed.2d 411 (1985).

II. THE QUALIFIED IMMUNITY DEFENSE

Defendant's Motion for Summary Judgment does not refute or deny that plaintiff's discharge was the result of his political ideology.[1] Instead, defendant posits an affirmative defense of qualified immunity, a judicially-created doctrine which provides that "government officials

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[1]Defendant does, however, deny this allegation at page one of his answer to plaintiff's complaint, and it is still a disputed issue in this case. Therefore, we will assume a political motivation for plaintiff's discharge for the purposes of determining this motion alone, not for the merits of the case.

performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." HARLOW v. FITZGERALD, 457 U.S. 800,812 (1982). Defendant thus contends that plaintiff's discharge was a discretionary decision, not in contravention of any established law at the time of its execution, (and that defendant is therefore entitled to qualified immunity.

A. THE OBJECTIVE STANDARD

A qualified immunity defense requires an objective review that looks to the state of the law at the time of the violation in a two-step analysis. To gauge the validity of such a defense, the Court must ascertain:

> 1) whether the government official's conduct violated a constitutional right that was "clearly established" at the time; and if so,
>
> 2) whether the official reasonably should have known that his acts constituted such a violation.

CREAMER v. PORTER, 754 F.2d 1311,1317 (8th Cir. 1985); HOBSON v. WILSON, 732 F.2d 1,26 (D.C.Cir. 1984); DE ABADIA v. IZQUIERDO MORA, 792 F.2d 1187 (1st Cir. 1986).

In determining the existing state of the law under step one of the analysis, it is not necessary that a "specific judicial articulation" of a fundamental legal principle be espoused by any court to constitute a well-settled rule. Basic constitutional rights are held to be established law if they are necessary to sustain the scheme of federal jurisprudence embodied in the U.S. Constitution and Bill of

Rights. BLACKBURN v. SNOW, 771 F.2d 556 (1st Cir. 1985); KING v. HIGGINS, 702 F.2d 18,20 (1st Cir. 1983).

Furthermore, under step two of the Court's review, although a government official will not be bound to "anticipate subsequent legal developments" or "'know' that the law forbade conduct not previously identified as unlawful," (HARLOW, *supra,* at page 817), he will be held to a uniform level of "presumptive knowledge" of constitutional standards. FLOYD v. FARRELL, 765 F.2d 1, 4-5 (1st Cir. 1985). Accordingly, the proper inquiry under the HARLOW standard requires that the Court "make an objective analysis of the reasonableness of conduct in light of the facts actually known to the officer and not consider the individual officer's subjective assessment of those facts." FLOYD, *supra,* at page 6.

Applying this analysis to the facts of the case at bar, we find that at the time of plaintiff's discharge in March of 1986, it was a well-established precept that dismissal of a public employee on the grounds of his or her political orientation was prohibited under the U.S. Constitution. In ELROD v. BURNS, 427 U.S. 347,360 (1976), the Supreme Court ruled that "the practice of patronage dismissals clearly infringes First Amendment interests," such as freedom of speech and freedom of association, and therefore, is barred as unconstitutional. Similarly, in BRANTI v. FINKEL, 445 U.S. 516,517 (1980), the Supreme Court again repudiated patronage dismissals as violative of First Amendment freedoms because of the "coercion of belief that necessarily flows from the knowledge that one must have a sponsor in the dominant party in order to retain one's job." These seminal cases, handed down ten and five years, respectively, before plaintiff's dismissal, conclusively re-

ject termination of a public official's employment for political reasons alone, save in exceptional circumstances.[2]

B. CONFIDENTIAL EMPLOYEES

Defendant's assertion that plaintiff had no constitutionally protected interest in continued employment because his position was one of "trust and confidence" under Puerto Rican law[3] is inapposite. The Supreme Court of Puerto Rico,[4] this Court,[5] and the First Circuit Court of Appeals[6] have all held that the Puerto Rico Public Service Personnel Act, 3 L.P.R.A. sections 1349 *et seq.*, which classifies certain government workers as "confidential employees", cannot be held to legislate away an employee's

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[2]Although we hold that adjudication of a legal principle by the U.S. Supreme Court is sufficient to constitute "well-settled law," knowledge of which will be imputed to all government officials, we note that the Supreme Court of Puerto Rico had also articulated the same rule three years prior to plaintiff's termination. RAMOS VILLANUEVA v. SECRETARIO DE COMERCIO, 112 D.P.R. 514 (1982); NAVEDO v. MUNICIPIO DE CEIBA, 112 D.P.R. 740 (1982). Thus, at the time of plaintiff's termination, the law was clearly established that an individual could not be dismissed on the basis of his political affiliation.

[3]3 L.P.R.A. section 1350 states:

> "Confidential employees are those who intervene or collaborate substantially in the formulation of public policy, who advise directly or render direct services to the head of the agency."

Subsection (4) provides that "confidential employees shall be of free selection and removal."

[4]*Colon v. CRUV*, 84 JTS 52 (P.R. 1984); *Ramos Villanueva v. Cintron*, 82 JTS 556 (P.R. 1982); *Clemente Gonzalez v. Depto. de la Vivienda*, 83 JTS 101 (P.R. 1983).

[5]*Rodriguez v. Munoz*, 603 F.Supp. 349 (D.C.P.R. 1985).

[6]*Abadia v. Izquierdo Mora*, 792 F.2d 1187 (1st Cir. 1986).

First Amendment protection. Accordingly, defendant's allegation as to the unsettled state of the law at the time of plaintiff's dismissal is without merit.

Having failed to establish that plaintiff's dismissal for his political following was an arguably undecided point of law in 1985, defendant's only recourse is to show that plaintiff's position falls within that special class of employment which requires adherence to the same political party as the Director for effective execution. Where political affiliation is a necessary prerequisite to properly complete the functions of a public post, this governmental interest supersedes an employee's First Amendment protections. BRANTI, supra, at 518. Accordingly, if defendant can demonstrate that plaintiff's position demanded political adherence by virtue of its inherent duties and responsibilities, defendant will have raised a complete defense, and will be entitled to summary judgment as a matter of law.

III. THE REQUIREMENT OF PARTY LOYALTY.

The standard of review to evaluate the reasonableness of a party loyalty requirement is "whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." BRANTI v. FINKEL, 445 U.S. at 518. To determine whether political orientation would interfere in the execution of the office, the Court must consider the cumulative functions and duties of the position, as well as its role in the greater structure of the PBA organization itself. Although the extent of the employee's policy-making authority and access to confidential infor-

mation are significant indicia of a need for political loyalty, ELROD v. BURNS, 427 U.S. 547 (1976), they are not dispositive. Factors to be considered include "the scope of discretion and responsibilities of the office," SCHEUER v. RHODES, 416 U.S. 232,240 (1974), and employment decisions at the higher level which "are essential to the effective implementation of important government policies." DE ABADIA v. IZQUIERDO MORA, 792 F.2d 1187,1191 (1st Cir. 1986).

The First Circuit Court of Appeals recently promulgated explicit guidelines with which to evaluate the appropriateness of a political affiliation requirement for a government office in the companion cases of JIMENEZ FUENTES v. TORRES GAZTAMBIDE, No. 85-1655, Slip Op. (1st Cir. Sept. 18, 1986), and DE CHOUDENS v. GOV'T. DEVELOPMENT BANK OF PUERTO RICO, No. 86-1059, Slip Op. (1st Cir. Sept. 19, 1986). In both cases, a public official was demoted because of his or her political affiliation, and subsequently brought suit against the government, alleging that the demotion was a constitutional violation. The government responded with the affirmative defense that party loyalty was indeed a proper job requirement for plaintiff's positions.

The District Court granted a preliminary injunction in each case, mandating reinstatement of the employees to their former positions, and the issue was brought before the First Circuit on interlocutory appeal from the grant of injunction. Upon reviewing the District Court's decisions, the Court of Appeals took pains to elaborate a framework of analysis to govern this Court's adjudication of future political discrimination cases. These articulated

standards are particularly useful when the public offices in JIMENEZ FUENTES and DE CHOUDENS are considered together, because the former position was found to require party membership, whereas the latter did not. The two decisions thus stand at opposite ends of the spectrum, and provide a comparative measure by which to gauge similar cases.

We focus more closely upon the case of JIMENEZ FUENTES, because the plaintiffs in that case were Regional Directors of the Puerto Rico Urban Development and Housing Corporation (hereinafter "CRUV") who were demoted to "career positions" as a result of their membership in the NPP. The Court of Appeals reversed the District Court's preliminary injunction ordering reinstatement to the office of Regional Director, on the grounds that plaintiffs failed to show their claims were likely to succeed on the merits. In so concluding, the First Circuit conducted a detailed assessment of the need for partisan political interests, not only in the office of Regional Director, but also in the CRUV agency as a whole, and found that party loyalty was a valid requirement for the position. Based on this premise, the District Court's preliminary injunction was reversed.

To evaluate the need for political affiliation, the Court of Appeals in JIMENEZ FUENTES imposed a threshold inquiry in the review process that looks to the comprehensive objectives and government goals entailed in the office: "does the position involve government decisionmaking on issues where there is room for political disagreement on goals or their implementation? Otherwise stated, do party goals or programs affect the direction, pace or quality of

governance?" Slip op., page 13. If this initial inquiry is found in the affirmative, then the court must proceed to a more detailed analysis of the specific duties and responsibilities of the office at issue: "the next step is to examine the particular responsibilities of the position to determine whether it resembles a policymaker, a privy to confidential information, a communicator, or some other office holder whose function is such that party affiliation is an equally appropriate requirement." Slip op., page 13. If this answer is also in the affirmative, then political patronage is indeed a valid prerequisite for the position, and the defendant is entitled to immunity from suit as well as from damages.

We begin, then, with the preliminary limen articulated by the First Circuit in JIMENEZ FUENTES—a determination of the impact of partisan politics on the exercise of the governmental functions accorded to the Regional Directors of the Public Building Authority. In so doing we are guided by the explicit analysis set forth in that case.

A. THE EFFECT OF PARTISAN POLITICS ON AGENCY FUNCTIONS.

The focal point of the First Circuit's threshold inquiry in JIMENEZ FUENTES was, quite properly, the effect of the political affiliation of the Regional Directors of CRUV on the agency's role of public housing services:

> [T]he provision of housing to low and middle income city residents is a vital political issue, at least as important to partisan program goals as the provision of water discussed in *Tomczak*. [*Tomczak v. City of Chicago*, 765 F.2d 633 (7th Cir. 1985).] A specific illustration of the link between public housing and political philosophies was provided at the hearing by

> defendants' expert witness, Dr. Jack Hirsbrunner, who conducted a study of the CRUV and concluded that political affiliation was an appropriate criterion for the position of Regional Director. He testified that the ideological differences between the PNP, which favors statehood for Puerto Rico, and the PPD, which favors autonomy, give rise to conflicting approaches to the programs and functions of CRUV. An ideological conflict, he believed, would hinder an administration's program. For example, one party favors the government taking an active role in administering properties while the other prefers that private industry assume these functions; additionally, he stated that one party desires the utilization of federal funds, while the other supports the use of local funds. Slip op. at 17-18.

While interference in government programs for motives of political sabotage may be a concern in public service agencies, which have direct contact with and influence upon the voting electorate, such a risk is not inherent the PBA.

22 L.P.R.A. 901 *et seq.* defines the purpose of the PBA as that of "provid[ing] lodging facilities for the schools, 'Health and Social Welfare Facilities,' offices, quarters, courts, warehouses, shops and other physical facilities of the Commonwealth, any department, agency, instrumentality or municipality." Thus, the PBA's principal function is to establish and maintain the buildings and other facilities that house the governmental and administrative agencies of Puerto Rico. It is not an agency vested with direct and immediate public contact or responsibility for public services, as is the CRUV. Nor is there significant room for ideological conflict in the execution of the duties of the PBA. Instead, the PBA is prin-

cipally a support agency, whose authority is confined to the limited sphere of government housing and maintenance in a specified region, with little, if any, direct communication with the voting constituents. Although the political debate between autonomy and statehood for Puerto Rico can arguably influence the allocation of public housing provided by the CRUV, as the First Circuit found in JIMENEZ FUENTES, this is not true of the government supplies and services rendered by the PBA. Building repair and maintenance is a political duty that will not be hampered or advanced by the Regional Director's political affiliation. For these reasons, this Court concludes that defendant has failed to satisfy the first test; namely, that the position of Regional Director of the PBA relates to political interests or concerns.

Nonetheless, even if the PBA were deemed a partisan agency, thereby meeting the threshold inquiry, this Court would still be compelled to deny defendant's Motion for Summary Judgment because the evidence presented does not meet the second standard of the JIMENEZ FUENTES-DE CHOUDENS analysis, e.g., a showing that the specific duties and responsibilities of the Regional Director demand political affiliation for proper execution.

B. THE DUTIES AND RESPONSIBILITIES OF THE REGIONAL DIRECTOR

The second stage of the inquiry looks to "the inherent powers and privileges of the position of Regional Director" JIMENEZ FUENTES, slip op. at page 18, in order to "identify where and how a person in plaintiff's position might help or hinder the pursuit of the [agency] leadership's strategic goals." DE CHOUDENS, slip op. at

page 12. The question is whether, "even assuming that the [agency's] strategic leadership positions are ones for which political affiliation is an appropriate requirement, is plaintiff's position within this group?" DE CHOUDENS, Slip op. at page 9. Assuming *arguendo* that the PBA qualifies under the threshold test as an agency subject to partisan influence, plaintiff's position as Regional Director does not merit political loyalty if it is not one of the strategic policymaking offices of the PBA.

Four specific items of proof were submitted by the parties to this action, itemizing the duties and responsibilities of the PBA Regional Director:

> 1. Government form OP-16, entitled "Questionnaire of Functions and Duties"; completed by plaintiff himself, and apportioning percentages of his work week to four categories of duties;
>
> 2. An organizational diagram of the PBA Administration's "Confidential Employees";
>
> 3. Three sworn statements by current PBA employees, one of whom includes the defendant, purporting to list 25 categories of job duties allegedly performed by the Regional Director;[7]
>
> 4. The Specification of Class prepared by the PBA, setting forth in general terms the Regional Director's duties, entitled "Itemization of Positions of Trust at the Public Building Authority and Brief Justification for their Classification as Such."

The issue thus becomes whether these documents, when considered separately or as a whole, provide convincing

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[7]Although these three affidavits ostensibly incorporate what appears to be a governmental OP-16 job description, this Court finds, for reasons discussed *infra*, that they do not qualify as actual OP-16 forms and in fact lack any probative value.

evidence that the Regional Director "perform[s] sufficiently important roles in the government to make political affiliation an appropriate requirement." JIMENEZ FUENTES, slip Op. at page 21.

PBA form OP-16 provides a comprehensive listing of the duties and responsibilities of the Regional Director, as prepared by plaintiff himself. According to the job description contained in that document, plaintiff spent approximately 30% of his work time executing the "supervision and coordination of all work to be done in the conservation and maintenance phases of all of the buildings in the Aguadilla region (32 buildings). 25% of his time was employed to "direct and supervise the administrative tasks of the region in its phases of personnel relations, clerical work, requisitions and acquisition of materials, etc.". The remainder of his working hours were employed in drafting the region's annual budget for approval by the Administrative Office, and executing miscellaneous tasks inherent in the office ("carrying out any other related duty that is requested and I am capable of doing").

This Court notes that the duties and functions actually performed by plaintiff are not alone determinative, as the true measure of a government position's need for party loyalty is established by "the inherent powers of the office, not what the individual office-holder actually does . . . Thus, if an officeholder performs fewer or less important functions than usually attend his position, he may still be exempt from the prohibition against political terminations if his position inherently encompasses tasks that render his political affiliation an appropriate prerequisite for effective performance." DE ABADIA v. IZQUIERDO

MORA, 792 F.2d 1187, 1192 (1st Cir. 1986), quoting MEEKS v. GRIMES, 779 F.2d 417, 419 n.1 (7th Cir. 1985). In other words, the tasks actually executed by a plaintiff cannot be used as a de facto limit on the powers of a government office when evaluating the need for party affiliation.

Therefore, we are bound to analyze the position of Regional Director in the very broadest of terms, considering all of the authority and power ascribed to that office by the agency itself. To this end, we will also review the diagram, affidavits and job classification prepared by PBA employees other than plaintiff, which set forth the duties of the Regional Director. The organizational diagram prepared by defendants illustrates the relationships between the upper strata of PBA officials. This pictorial representation shows that the office of Regional Director is actually a sixth level position in the administrative hierarchy, subordinate to the Construction Department, Design Department, Office of Public Relations, Executive Director, and of course, the Board of Directors. The diagram reveals that the office of Regional Director is not an elevated post with significant decision-making authority; rather, it is the very lowest level of the PBA's confidential employees.

Defendant also submitted three affidavits by PBA employees Betsy N. Gonzalez, Luis Rafael Arias, and Enrique Guzman Vidal, which purport to describe the duties of the office of Regional Director. Each affidavit consists of a one-page assertion that the responsibilities set forth in the appended OP-16 form are those of the office of Regional Director. Twenty-five categories of duties are

then itemized in a separate attachment to the affidavit, and the same attachment, listing identical categories, is used for all three affidavits.

The three affidavits are fatally deficient in that they fail to "show affirmatively that the affiant is competent to testify to the matter stated therein," as required by Rule 56(e) of the Fed.R.Civ.P. There is no showing of the means by which the affiants acquired knowledge of the duties of the PBA Regional Director; no suggestion of the time frame in which such knowledge was acquired; and no indication of the source of the identical appended lists of duties. Instead, the affidavits merely include a blanket assertion that each affiant has "personal knowledge of the functions performed by the Agency's Regional Directors because of my position." This is completely inadequate, for "when affidavits are offered in support of a motion for summary judgment, they must present admissible evidence, and must not only be made on personal knowledge of the affiant, *but must show that the affiant possesses the knowledge asserted.*" (Emphasis added.) SPRAGUE v. VOGT, 150 F.2d 795, 800 (8th Cir. 1945). A verified pleading that fails to affirmatively show the affiant is competent to testify to the matters stated herein, or that the facts asserted are predicated on his personal knowledge, cannot serve as the basis for a motion for summary judgment. GORDON v. WATSON, 622 F.2d 120, 125 (5th Cir. 1980); ONIS v. BARROWS, 538 F.2d 904 (1st Cir. 1976). Failure to incorporate such a foundational showing effectively deprives the affidavit of all probative value for purposes of the motion. BLOSSOM FARM PRODS. CO. v. AMTRACO COMMODITY CORP., 64 F.R.D. 424 (D.C.N.Y. 1974).

We also note that despite the false appearance of authority lent to the three affidavits by their attempted incorporation of the government's OP-16 form, they do not qualify as official, agency-sponsored OP-16 job descriptions. The purported OP-16 appended to each of these affidavits clearly was not prepared in the course of the agency's classification process, and does not include any of the supporting evidence that normally accompanies an agency-sponsored OP-16 job description. The heading, which identifies the individual completing the form, is left blank, and the form is not signed by its author. Moreover, there is no Spanish version of the listing of duties, as is true of all OP-16 forms executed within the agency. Instead, the document submitted by the affiants is a self-serving job description drafted on an OP-16 form for the sole purpose of providing additional support for defendant's Motion for Summary Judgment.

Accordingly, we do not regard these three documents as agency-executed OP-16 forms, like the one completed by plaintiff, but consider them to be mere statements of opinion in affidavit form. Further, because we find that the affidavits are fatally defective as a matter of law, we decline to accord them any significant probative value.

Defendant's fourth item of proof, the PBA "Itemization of Positions of Trust," which provides the general grant of authority to each administrative office of the agency that qualifies as a position of trust and confidence, merely states that "the Regional Directors have the responsibility for the administration, supervision, direction and inspection of the Authority's projects under construction. Therefore, they coordinate, direct, supervise and inspect the activities comprised in all the construction cycle

in his Region." Again, this presents an operational-level position, charged with overseeing execution of quotidian duties, *not* an extensive and unfettered policy-making function.

Plaintiff's responsibilities in the PBA differ from the duties performed by plaintiffs in JIMENEZ FUENTES, in several important respects. In JIMENEZ FUENTES, the Court grouped the duties of the Regional Director into four classes of authoritative power susceptible to political influence: (1) policy-making functions, (2) representative functions, (3) spokesperson functions, and (4) personnel duties. A careful comparison of the job descriptions enumerated under each heading with those assigned to plaintiff reveals a marked contrast between the position of Regional Director of CRUV, and its counterpart in the PBA.

First, plaintiff was not charged with formulating agency policy or analyzing confidential information; he was merely responsible for overseeing direct execution of the programs and directives established by the Administrative Office of the PBA. His role was analogous to that of a conduit, channeling the agency's prescribed policies into actual projects at the operaitonal level. Although plaintiff had supervisory authority over ministerial tasks, such as the requisition of supplies and prioritizing of work orders, he had little involvement with the total services provided by PBA. Plaintiff had no input into the apportionment of funds to the various regions of the PBA, or the allocation of buildings to different government branches. He did not work in or have an office in the central PBA headquarters, the centralized policy-making body of the agency. Rather, he was one of seven regional directors, whose jurisdiction was strictly circumscribed by their geo-

graphic locations. Thus, unlike the Regional Directors of CRUV, he was not "the alter ego of the Executive Director at the Regional level," (slip op. at page 21), but rather a controlled mechanism by which the Executive Director's preordained mandates were effected. Plaintiff did not make the agency's policy—he was bound by it.

Plaintiff's "representative functions" were also negligible, particularly when compared to the high-profile community-oriented tasks assigned to the Regional Director of CRUV. Whereas the latter was required to: "[Conduct] periodic meetings on regulations, work guidelines, etc. with supervisory personnel; [Meet] with residents and general public to resolve problem cases; [Meet] with residents and organized groups to coordinate social activities," (slip op. at page 19), no such demands were incumbent on plaintiff.[8] Again, this is attributable in part to the inherent limitations of a government support organization, as distinguished from a public service agency. We also note that plaintiff had none of the "spokesperson functions" mentioned in JIMENEZ FUENTES and DE CHOUDENS —he did not draft correspondence for the Executive or Associate Directors, and did not interface directly with the Board of Directors on behalf of the agency.

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[8]We note that the only "representative function" accorded to the position of PBA Regional Director in defendant's motion was to "represent the Executive Director at any official meetings with other agency directors, school directors, etc., in order to determine leasing contract requirements." Such a task is not a truly representative function, as the Regional Director's contact is limited to other government and agency officials, and is confined to the subject of leasing contracts. Contrast this role with the greater public contact, decision-making authority, and discretionary powers assigned to the Regional Directors of CRUV.

Lastly, plaintiff's "personal duties" were substantially less discretionary than those of the CRUV positions in JIMENEZ FUENTES. Although plaintiff, like the Regional Directors of CRUV, was vested with power to supervise and evaluate the Region's supervisors and to make recommendations regarding recruitment, dismissals, and promotions, his jurisdiction extended to only 54 employees, as compared to the 300 worker staff in each CRUV region. The majority of those 54 regional workers (approximately 40 people), are union members whose terms of employment are defined by the union contract with the PBA. This obviously leaves the Regional Director with little influence over their salary, working hours, job duties, and cause for termination. Moreover, the Personnel Relations Department of the PBA had the ultimate responsibility for hiring, firing, employee training, negotiating with the labor unions and resolving labor grievances. Thus, the Regional Director's personnel authority is at most the mere ability to suggest or recommend actions by the agency's administrators, and then only at the regional level.

The fact that a public office is bestowed with a seemingly elevated title does not establish its ranking as a policy-making position, as is shown by the Court's opinion in DE CHOUDENS v. GOVERNMENT DEV'T. BANK OF PUERTO RICO, No. 86-1059, slip op. (1st Cir. Sept. 18, 1986), the companion case to JIMENEZ FUENTES. In DE CHOUDENS, the First Circuit held that plaintiff's employment as Senior Vice President of the government bank's Public Financing Department did not necessitate party affiliation for proper execution, because her "policy-making, confidential communicative position" was "both empowered and constrained by the limits of her specialized functions." Slip op. at page 9.

In other words, despite her purportedly officious position, the Vice President's discretionary and policy-making authority was sufficiently removed from the politically-influenced functions of the agency so as to abrogate the need for party loyalty.

Th office of Regional Director of the PBA is similarly constrained to "politically-neutral, technical or professional matters." Slip op. at page 11. Like the position of the plaintiff in DE CHOUDENS, the role of the PBA Regional Director is "so remote from advancing or thwarting the agency's partisan-responsive goals that political affiliation would not be considered an appropriate requirement." Slip op. at page 3. The Regional Director's discretionary authority is limited to the requisitioning of supplies, prioritizing of work orders, and making "recommendations" to his supervisor about program flaws and improvement. Clearly, the party membership of the Regional Director would have little, if any, effect on these tasks. Such functions are a far cry from the strategic duties that would permit the representative government to "be undercut by tactics obstructing the implementation of policies of the new administration, policies presumably sanctioned by the electorate." ELROD v. BURNS, *supra*, at page 367. Therefore, plaintiff's dismissal based on his party membership does not fall within the political affiliation exception to patronage dismissals.

Defendant has presented no evidence that extraordinary circumstances exist, or that he could not have known his actions were in violation of the U.S. Constitution. Accordingly, defendant is held to the standard of a reasonably competent official, and is presumed to know the law governing his conduct.

We therefore find that a reasonably competent government official should have known that political affiliation was not an appropriate requirement for the position of PBA Regional Director, and that a discharge for political reasons would violate the First Amendment.

WHEREFORE, defendant's Motion for Summary Judgment is DENIED. There being no reason to impose a stay on discovery or the trial proceedings, the Request for Stay is also DENIED.

IT IS SO ORDERED.

San Juan, Puerto Rico, October 21, 1986.

/s/ HECTOR M. LAFFITTE
U.S. District Judge

APPENDIX C

IN THE SUPREME COURT OF PUERTO RICO

Arturo Ramos Villanueva,

Plaintiff and appellee

v. No. R-81-137 Review

Juan Cintron, Secretary of Commerce, etc.,

Defendants and appellants

MR. JUSTICE NEGRON GARCIA delivered the opinion of the Court.

San Juan, Puerto Rico, March 31, 1982

We affirm here the Superior Court's opinion which annulled, in the factual circumstances of the case at bar, an employee's dismissal for political reasons. Defendants-appellants' thesis that said dismissal is valid because appellee Ramos Villanueva's position—Director of the Aguadilla Region—was confidential and because he participated in the agency's policy-making, violates the basic guarantees of our Constitution, the First Amendment to the Federal Constitution, and the most recent federal case law. We shall explain ourselves.

I

The learned trial court found that Ramos Villanueva's dismissal was mainly due to his political affiliation. It then applied the rule laid down by the Federal Supreme Court in *Branti v. Finkel,* 445 U.S. 507 (1980), and concluded that the dismissal was null. Its decision was correct.

[1-4] In *Branti,* which decision was based on the fundamental right to freedom of association,[1] the Federal Court deemed that "[i]f the First Amendment protects a public employee from discharge based on what he has said, it must also protect him from discharge based on what he believes. Under this line of analysis, unless the government can demonstrate 'an overriding interest,' . . . 'of vital importance,' . . . requiring that a person's private beliefs conform to those of the hiring authority, his beliefs cannot be the sole basis for depriving him of continued public employment." At 515. Citing *Elrod v. Burns,* 427 U.S. 347 (1976), the Court acknowledged that partisan affiliation could be "an acceptable requirement for some types of government employment," and thus it concluded that "if an employee's private political beliefs would interfere with the discharge of his public duties, his First Amendment rights may be required to yield to the State's vital interest in maintaining governmental effectiveness and efficiency. . . ." Based on the foregoing, the Court concluded:

> In sum, the ultimate inquiry is not whether the label "policymaker" or "confidential" fits a particular position; *rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved.* (Italics supplied.) At 518.

[5] From the foregoing statements we may reasonably conclude that the hiring authority (the government)

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[1]The fundamental rights protected by the Federal Constitution and the case law rules that define their contents and scope, extend to Puerto Rico. *Pueblo v. Duarte Mendoza,* 109 D.P.R. 596 (1980).

must bring evidence to show that the employee's particular political affiliation is an "appropriate requirement" for the effective discharge of the public office in question; that is to say, the Government must establish the existence of government interests that rank above the employee's rights under the First Amendment.

In the case at bar, the Government failed to establish this. The record shows that the hiring authority did not bring any evidence to demonstrate that the political affiliation of the employee appointed to the position held by Ramos Villanueva was an appropriate requirement for the effective discharge of such office. On the contrary, the agency's Personnel Director said that she "did not know that the incumbent's political affiliation had any impact whatsoever or was in any way essential for the development of the agency's programs." Her testimony was corroborated by the evidence brought by the Government in the sense that analogous offices—those of the Guayama and Fajardo regional directors—"are classified within the *career service* and this situation has not caused any problems whatsoever in the development of the Department's programs . . . ."

In order to overcome the negative impact of this reality, the appellants give inordinate value to a letter of June 23, 1973[2] whereby Damian Folch, the then Secretary of

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[2]Insofar as pertinent, it reads:

"As of that same date, I will include in the Non-Competitive Service position No. 236 of the Executive Director I assigned to the Aguadilla Regional Office. This position, whose functional title is Regional Director, was created on

(Continued on following page)

Commerce, informed Milagros Guzman, the Director of Personnel, that he was going to classify Ramos Villanueva's position in the "Non-Competitive Service." A careful analysis of its contents shows, at the most, that the author's view on this point was: (a) that the person who would hold the office should be within the Secretary's confidence; and (b) that he "[should] have to make decisions on his own initiative" in order to implement the law, that is to say, he should somehow be a policymaker. Unless we infer that the expression that this officer " . . . represents me as Secretary of Commerce, while he also represents our Government," embodies, includes and expounds a claim for strict partisan affiliation, there is no evidence to support the Government's thesis. This notwithstanding, as we have said above, we would have to reject, with no apparent reason, the direct and uncontroverted testimony of the Director of Personnel in the sense that the incumbent's political affiliation did not have "any impact whatsoever or was in any way essential for the development of the agency's programs." In other words, the record does not favor the following questions: It a particular political affiliation necessary for the faithful discharge of the office? Are there overriding government interests to justify the en-

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(Continued from previous page)

July 1, 1972 and since then, it has remained in the Competitive Service.

"This action is based on the fact that the incumbent to be appointed in said position must be within my confidence as Secretary of Commerce. Due partly to its geographic position, the Aguadilla Regional Office must have certain independence, since the Regional Director will have to make decisions on his own initiative in order to implement and to give follow-up to the mandate we have been given by law. In his capacity, he represents me as Secretary of Commerce, while he also *represents our Government.*"

croachment upon the incumbent's constitutional rights? We repeat that the evidence brought by the Government only allows us to answer these questions in the negative.

II

[6-7] Once these points of the evidence have been clarified, it is easy to see that the hiring authority's action constitutes an undue intrusion on Ramos Villanueva's right not to be discriminated against because of political beliefs, right which is enshrined in our Constitution. Art. II, Secs. 1, 4, 6, 7.[3] There is no doubt as to the substantial nature of this right—fundamental in a democratic form of government, and a corollary of dignity, respect, and equality before the law. Although it is not unlimited, it may, in certain circumstances, yield before high-ranking communitary interests—*Hermina Gonzalez v. Secretario del Trabajo,* 107 D.P.R. 667, 675 (1978); *E.L.A. v. Hermandad de Empleados,* 104 D.P.R. 436, 446 (1975); *Mari Bras v. Casanas,* 96 P.R.R. 15, 20 (1968)—and in the circumstances of the instant case—and subject to a strict judicial scrutiny, *Zachry International v. Tribunal Superior,* 104 D.P.R. 267

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[3]All employees, even those who are confidential, enjoy a protection against discrimination for political beliefs. In *Baez Cancel v. Mayor Mun. of Guaynabo,* 100 P.R.R. 980, 985-986 (1972), we said:

> "Section 1 of Art. II of the Constitution of the Commonwealth of Puerto Rico prescribes in a clear manner that 'no discrimination shall be made on account of race, color . . . political or religious ideas.' The proscription of discrimination is clear and final. *Its text does not permit any distinction.* It means to say what it says, That the State in any of its multiple functions or services shall not discriminate against a *citizen* because of the mere fact that the latter is colored, an atheist, or on account of his political ideas. Any other construction would enervate its efficacy. To strengthen it and not to weaken it is our duty, as the principal custodians of the Constitution."

(1975); *Leon Rosario v. Torres,* 109 D.P.R. 804 (1980)—this right should prevail.

III

Finally, this decision does not pass on the validity per se of a confidential classification,[4] nor does it question the power of the hiring authority to, in such instances, do without the services of an incumbent without previous notice, preferment of charges, and hearing. *Diaz Gonzalez v. Tribunal Superior,* 102 D.P.R. 195, 197 (1974). Neither does it prejudge the possibility that in other cases of dismissals attributable to political reasons, it may be lawfully detected and established—to the satisfaction of the Judicial Power—that the "political affiliation" requirement is expressly set forth or impliedly submerged and embodied in the previous classification, adopted through legislative, executive or administrative power upon creating an office under the *confidential* category.

[8] Our decision simply means that the prevailing constitutional scheme recognizes and permits that, in certain circumstances, a particular politico-partisan affiliation be validly required in order to obtain and keep a public office. However, in view of the excellency presupposed and sought by a personnel system based on merit, the minimum continuity and stability of the Government's operation—irrespectively of who has temporarily the People's mandate—and the democratic maturity and tolerance to which our Constitution aspires, it is reasonable to conclude that

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[4]Please remember that the uncontroverted evidence established that the Guayama and Fajardo regional directors were classified as *career* employees whereas Ramos Villanueva's office was *confidential.* The least we can say is that this is an incongruity in the uniform and scientific implementation of the merit system.

such cases constitute not the rule but the exception. Certainly, the case at bar cannot be placed within the singularity rule contemplated.

In view of the foregoing, in strict law and constitutional analysis, *judgment shall be rendered affirming the decision of the Superior Court which annulled the dismissal.*

Mr. Justice Diaz Cruz issued a dissenting opinion. Mr. Justice Irizarry Yunque took no part in this decision.

CHIEF CLERK'S CERTIFICATE

I, Bruno Cortes Trigo, Chief Clerk of the Supreme Court of Puerto Rico, DO HEREBY CERTIFY:

That the annexed document is a photocopy of the official translation from Spanish into English (said translation having been made under the authority of Act No. 87 of May 31, 1972) of the opinion rendered by this Court on March 31, 1982, in case No. R-81-137, Ramos v. Sec. of Commerce, the original of which, in Spanish, is under my custody in this Office.

IN WITNESS WHEREOF, and at the request of the interested party, and upon payment of the corresponding fees, I have hereunto set my hand and affixed the seal of this Court in San Juan, Puerto Rico, this 3rd day of November 1987.

Bruno Cortes Trigo
Chief Clerk
Supreme Court of Puerto Rico

(SEAL)

(2)

FILED
FEB 26 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1039

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

LUIS O. JUARBE ANGUEIRA,

Petitioner,

v.

LUIS RAFAEL ARIAS, Director of the Public Buildings Authority,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF IN OPPOSITION

HON. HECTOR RIVERA CRUZ
Secretary of Justice
Commonwealth of Puerto Rico

HON. RAFAEL ORTIZ CARRION
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February 26, 1988

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTION PRESENTED

Whether for purposes of the qualified immunity defense raised by respondent in a 42 U.S.C. § 1983 civil rights action based on an alleged politically based discharge that violates the First Amendment, the determination of what constitutes "clearly established" federal constitutional law should be evaluated exclusively by reference to the opinions of the Supreme Court of the Commonwealth of Puerto Rico and without considering the considerable body of case law from circuit courts of appeals and district courts.

PARTIES TO THE PROCEEDINGS BELOW

The parties before the Court of Appeals for the First Circuit were Luis O. Juarbe Angueira, Petitioner herein; and Luis Rafael Arias, the Executive Director of the Public Buildings Authority of the Commonwealth of Puerto Rico, Respondent herein. Respondent was sued in both his official and personal capacities.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

LUIS O. JUARBE ANGUEIRA,

Petitioner,

v.

LUIS RAFAEL ARIAS, Director Of The Public Buildings Authority,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF IN OPPOSITION

Respondent respectfully requests that the Court deny the petition for writ of certiorari filed by petitioner, seeking review of the First Circuit's judgment in this case. The opinion upon which that judgment is based is reported as *Juarbe-Angueira v. Arias*, 831 F.2d 11 (1st Cir. 1987) ("*Juarbe Angueira*") (Breyer, J.). *See also* Ptn. App. A1-A16.

STATEMENT OF THE CASE

The question presented in this case arose from a civil rights action filed by petitioner that challenged the authority of the newly elected government of the

Commonwealth of Puerto Rico to appoint, to a limited number of policymaking positions, those public officials that formulate and implement the policies that have been sanctioned by the electorate. The relevant facts of this case are adequately set forth in the opinion of the court of appeals, *see* 831 F.2d at 12, and require little elaboration. Respondent in this case is the Executive Director of the Public Buildings Authority ("PBA") of the Commonwealth of Puerto Rico.[1] He was appointed to that office during the first two months of 1985 by the administration that assumed power in January, 1985, after the Partido Popular Democratico (PPD—Popular Democratic Party) defeated the Partido Nuevo Progresista (PNP—New Progressive Party) in the November, 1984 gubernatorial election.[2]

Petitioner was a Regional Director of the Aguadilla Region of the PBA in Puerto Rico. He served under the Auxiliary Executive Director for Operations Area, two levels down from the Executive Director. He supervised 54 employees, including two building administrators, two conservation supervisors, four clerical personnel employees, nine conservation technicians, and 37 conservation workers. Thus, he held a fairly

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[1] The PBA is an instrumentality of the of the Commonwealth of Puerto Rico attached to the General Services Administration. P.R. Laws Ann. tit. 22, § 902 (1965), Reorganization Plan No. 2 of 1971, § VII, App. I of P.R. Laws Ann. tit. 3, § 933 (1978). The PBA has a broad range of functions, including the design, construction and operation of schools, public hospitals and other health and social welfare facilities, office buildings, courthouses, and any other physical facility related with government services. P.R. Laws Ann. tit. 22, § 903 (1965).

[2] The PNP was the ruling party in Puerto Rico from 1977 to 1985.

high-level position within the agency. *See*, 831 F.2d at 15.

The inherent powers and functions of a Regional Director are contained in a job description as to which there was no disagreement at any of the hearings held in this case. The job description contains many significant policy-making duties, that are described in the First Circuit's opinion. *See* 831 F.2d at 15. The inherent powers contained in that job description showed that the Regional Director proposes, establishes, and implements public policy on subjects that potentially involve political issues. For instance, he directs the "Authority's projects under construction," directs, plans, and supervises all "maintenance and conservation services for the Authority's buildings in [their] region." *Id.* He also prepares a budget for the region, "a matter likely to be of considerable interest to the elected and other government officials who work there." *Id.* at 16. Similarly, the position has well-defined representative and spokesperson functions, since the Regional Director is the "official representative[] of the Authority and its Executive Director in [the] region in regards to the relationship to be established with municipal officers, other Government representatives and the general public." 831 F.2d at 15. Moreover, the agreed to functions demonstrate that the Regional Director is privy to confidential information.

The position of Regional Director is closely related to partisan political interests or concerns. Regional Directors are the top line officers or "the alter ego of the Executive Director [of the PBA] at the regional level". *Accord, Jimenez Fuentes v. Torres Gaztambide*, 807 F.2d 236, 245 (1st Cir. 1986), *cert. denied*,

__ U.S. __, 107 S. Ct. 1888 (1987). Moreover, each region is a microcosm of the larger agency, and the duties of each Regional Director are representative of the duties of the agency's Executive Director.

The political concerns or interests of the PBA can hardly be disputed. The statute creating the PBA defines its duties as "provid[ing] lodging facilities for schools, 'Health and Social Welfare Facilities', offices, quarters, courts, warehouses, shops and other physical facilities of the Commonwealth, any department, agency, instrumentality or municipality." P.R. Laws Ann. tit. 22, § 903 (Supp. 1983). These facts indicate that the PBA's mission is of a sort that might well involve the agency in the political process. "Where, how, and when the government will repair or reconstruct public buildings, which towns will have which priorities, when and where money is to be spent, may well be a matter of considerable interest to government officials including political leaders." *Juarbe Angueira*, 831 F.2d at 15. It is no exaggeration to say that elections often turn on the success or failure of the incumbent to provide public services such as those provided by the PBA. *See, Tomczak v. City of Chicago*, 765 F.2d 633, 641 (7th Cir.), *cert. denied*, 474 U.S. 946 (1985). That party affiliation is an appropriate requirement for the effective performance of a job of this nature can hardly be questioned.

In March 1985, respondent, acting pursuant to the provisions governing the civil service system of the Commonwealth, dismissed petitioner from the position of Regional Director.[3] Petitioner subsequently sued

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[3] Under the Puerto Rico Public Service Personnel Act of 1975, P.R. Laws Ann. tit. 3, §§ 1301-1431 (1978), that establishes a

respondent claiming that he had been dismissed for political reasons in violation of the First and Fourteenth Amendments to the Constitution of the United States. *Branti v. Finkel*, 445 U.S. 507 (1980) ("*Branti*"); *Elrod v. Burns*, 427 U.S.347 (1976) ("*Elrod*").

Respondent moved for summary judgment to dismiss the damage claim. He said that the dismissal either was legal or its illegality in early 1985, was, at least, unclear and therefore he was protected from suit by qualified immunity. *Harlow v. Fitzgerald*, 457 U.S. 800, 815-19 (1982) ("*Harlow*"); *Davis v. Scherer*,

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modern civil service system in Puerto Rico, all government employees are classified in one of two categories: career employees and confidential (trust) employees. *Id.* § 1349. Under the statute, the position of Regional Director is classified as a confidential position or a position of trust. *Id.* § 1350. Employees in these positions have no property right, but are "of free selection and removal." *Id.* Confidential positions constitute a restricted category that cannot surpass 25 such positions per agency, except in extraordinary circumstances due to the size or complexity of the agency. *Id.* § 1351. All other positions are classified as career positions. *Id.* § 1352. Confidential positions are restricted to those positions that "intervene or collaborate substantially in the formulation of public policy, who advise directly or render direct services to the head of the agency." *Id.* § 1350. The objective of this restricted category is to "assure that the government has adequate means, through the wise and restricted use of the confidential service, to implement the public policy validated by the majority. . . ." *Id.* §1312(5).

The civil service system of Puerto Rico is a carefully wrought system for the administration of government personnel. It is the end result of the hard fought efforts of many years aimed at establishing merit as the principle that shall govern the entire system. *Id.* § 1311. The people of Puerto Rico justly feel proud of this accomplishment.

468 U.S. 183, 190-97 (1984) ("*Davis*"); *Anderson v. Creighton*, ___ U.S. ___, ___-___, 107 S. Ct. 3034, 3037-40 (1987) ("*Anderson*"); *De Abadía v. Izquierdo Mora*, 792 F.2d 1187 (1st Cir. 1986); *Méndez-Palou v. Rohena-Betancourt*, 813 F.2d 1255 (1st Cir. 1987). The United States District Court for the District of Puerto Rico denied respondent's motion. Respondent appealed that interlocutory decision. *Mitchell v. Forsyth*, 472 U.S. 511 (1985).

On September 29, 1987, after full briefing and oral argument, the court of appeals reversed the judgment of the district court in respect to the issue of qualified immunity. The First Circuit, in a well reasoned opinion, correctly held that at the time of the dismissal in March, 1985, the law was unclear. "That is, as of that time one could not say that the dismissal was *clearly* unlawful. And, only where the action in question is *clearly* unlawful does a defendant lose his qualified immunity." *Juarbe Angueira*, 831 F.2d at 12, *citing Harlow v. Fitzgerald*, 457 U.S. at 818. Petitioner then sought review from this Court, seeking to overturn the decision of the First Circuit.

REASONS FOR DENYING THE WRIT

I. "The First Circuit's Decision Is Not in Conflict with the Decisions of this Court or of any Federal Circuit Court of Appeals, Because for Purposes of Qualified Immunity the State of Preexisting Federal Constitutional Law Is Not Determined Exclusively by Reference to the Opinions of the State's Supreme Court.

Petitioner presents a single argument to justify the grant of certiorari. He merely claims, without citing any case law for the proposition, that the determination of whether or not the preexisting law is clearly

established for purposes of the qualified immunity doctrine is to be made in this case exclusively by reference to the opinions of the Supreme Court of the Commonwealth of Puerto Rico. According to petitioner, all of these decisions clearly established that a regional director such as himself, was protected under the First Amendment from a politically based discharge for purposes of the *Elrod-Branti* doctrine. Therefore, he argues, the First Circuit committed reversible error when it failed to follow those decisions, and instead decided that respondent's actions were not clearly unlawful on the basis of its interpretation of the decisions of this Court and of numerous decisions by other courts of appeals.

Petitioner's sole argument is simply wrong. Contrary to his unfounded allegations, a reading of the opinion in *Juarbe Angueira* clearly demonstrates that it is consistent with this Court's qualified immunity decisions in *Harlow*, *Davis* and *Anderson*, as well as with a considerable body of case law from courts of appeals and district courts that have applied the qualified immunity doctrine, as well as the *Elrod-Branti* doctrine. Simply stated, there is no conflict and no justification for this Court's intervention.

First. Petitioner conveniently overlooks the fact that this Court has never sustained the proposition he advances, that the state of the law is to be evaluated solely by reference to the opinions of a single state's supreme court. Although the Court has articulated the rule of qualified immunity, it has not fully explained what it means by the phrase "clearly established law". Indeed, it has not specified which court one must look to in determining whether a right is clearly estab-

lished. *See Benson v. Allphin*, 786 F.2d 268, 275 (7th Cir. 1986).

In an often quoted footnote in *Harlow*, the Court declared that it "need not define here the circumstances under which the 'state of the law' should be 'evaluated by reference to the opinions of this Court, of the Court of Appeals, or of the local District Court.'" *Harlow*, 457 U.S. at 818 n. 32, *quoting Procunier v. Navarette*, 434 U.S. 555, 565 (1978). It is clear that petitioner's proposition is not sustained by the opinions of this Court in *Harlow* and *Procunier*.

If anything can be intimated from the opinions cited above is that the lower courts should not limit themselves to any set of decisional law when identifying what constitutes clearly established law. The Court's recent decision in *Anderson v. Creighton*, __ U.S. __ , 107 S. Ct. 3034 (1987) lends support to this conclusion. In this case, the Court held that for the qualified immunity standard to operate, the relevant legal rule cannot be identified at a high level of generality. The "right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right;" *id.* at 3039, "the unlawfulness must be apparent." *Id.*

The Court in *Anderson* rejected a proposition similar to petitioner's, which the Court characterized as procrustean: that qualified immunity be rejected on the basis of a common law strict liability rule that was applied to officers conducting searches of innocent third parties' homes. The Court reasoned that since qualified immunity is "intended to provide gov-

ernment officials with the ability 'reasonably [t]o anticipate when their conduct may give rise to liability for damages;" *id.* at 3042, that security would be "utterly defeated" if officials were unable to determine whether they were protected by the immunity "without entangling themselves in the vagaries of the English and American common law." *Id.*

In this case, petitioner's contention, if it were to be accepted, would require that government officials entangle themselves into the vagaries of state court interpretation of the protection afforded by state constitutional law or the First Amendment, to government employees who claim that they were dismissed for political reasons, in order to determined whether they are protected by qualified immunity from a claim raised in federal court on the basis of federal law. And, in addition, the government official would be prevented from considering the opinions of other federal courts when evaluating their conduct. Such a proposition is not only contrary to *Harlow*, *Davis* and *Anderson*, but it is simply too absurd to justify this Court's intervention.

Second. The First Circuit's decision to evaluate the state of the law by reference to decisions of this Court, of the courts of appeals and district courts, follows the practice adopted by other courts of appeals faced with the rather difficult issue of defining "clearly established law." *See, e.g., Benson v. Allphin*, 786 F.2d at 275 (reliance on Supreme Court decisions alone might be inappropriate because they are infrequent in comparison to decisions of the district and appellate courts); *Capoeman v. Reed*, 754 F.2d 1512, 1514 (9th Cir. 1985) (in the absence of binding precedent, a court should look to all decisional law avail-

able); *People of Three Mile Island v. Nuclear Regulatory Comm'rs*, 747 F.2d 139, 144 (3d Cir. 1984) (apply general, well developed legal principles). *See also, Hobson v. Wilson*, 737 F.2d 1, 26 (D.C. Cir. 1984) (law clearly established if illegality of the conduct alleged is well-established by any definition of the phrase). *Cf. Wallace v. King*, 626 F.2d 1157, 1161 (4th Cir.) (immunity allowed where law not authoritatively decided by the Supreme Court, the "appropriate" court of appeals, or the highest state court), *cert. denied*, 451 U.S. 969 (1981).[4]

II. "The Decision of the First Circuit Is Not in Conflict with any Federal Question Decided by the Supreme Court of Puerto Rico.

Petitioner incorrectly argues that the decision of the First Circuit in this case conflicts with decisions of the Supreme Court of Puerto Rico on the same federal question—the application of *Elrod* and *Branti* to government employees, and that in so doing the court of appeals has established a double standard. (Ptn. 11) There is no such conflict. The decisions of the Supreme Court of Puerto Rico cited by petitioner are based on that court's interpretation of the Constitution of Puerto Rico. *See Colón v. C.R.U.V.*, 115 P.R. Dec. 503 (1984); *Clemente González v. Department of Housing*, 114 P.R. Dec. 763 (1983); *Franco v. Municipality of Cidra*, 113 P.R. Dec. 260 (1982); *Ramos Villanueva v. Secretary of Commerce*, 112 P.R. Dec. 514, *cert. denied* 459 U.S. 908 (1982); *Diaz de*

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[4] Other examples of the experience had by the lower courts in following *Harlow* are discussed in Comment, *Harlow v. Fitzgerald: The Lower Courts Implement the New Standard for Qualified Immunity Under Section 1983*, 132 U. Pa. L. Rev. 901 (1984).

Llobet v. Office of the Governor, 112 P.R. Dec. 747 (1982). *See also, Olivieri v. Pierluissi*, 114 P.R. Dec. 23 (1983), which is not cited by petitioner.

Petitioner insists, but hardly demonstrates, that in these opinions the Supreme Court of Puerto Rico based its decisions on the First Amendment to the United States Constitution, and that those decisions determine a "clearly established law" that is in direct conflict with the First Circuit's decision. This argument seems to ignore the fact, as demonstrated by a careful reading of any of the decisions relied on by petitioner, that what the Supreme Court of Puerto Rico is doing is interpreting the Constitution of the Commonwealth.

The First Circuit has considered many of the opinions cited by petitioner, on the several occasions it has had to deal with the same issue here in question.[5] The court has held correctly that those cases, based on Puerto Rican law, are not conclusive as to the

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[5] Since 1985 Puerto Rico presents a unique situation. From the first months of 1985 to the summer of 1986 about 319 former government employees have brought civil rights suits in the federal district court claiming violations of their First Amendment rights. *Juarbe*, 831 F.2d at 14. The First Circuit has had to face dozens of interlocutory appeals from denials of qualified immunity to the government officers sued in those cases, most of whom were the heads or top level officials of practically all agencies of the Commonwealth government. In the performance of this difficult task the court of appeals has done a highly creditable job. *See, e.g., Raffucci v. Zayas*, 816 F.2d 818 (1st Cir. 1987); *Pérez Quintana v. Gracia Anselmi*, 817 F.2d 891 (1st Cir. 1987); *Monge-Vázquez v. Rohena-Betancourt*, 813 F.2d 22 (1st Cir. 1987); *Alicea Rosado v. Zayas*, 813 F.2d 1263 (1st Cir. 1987). *Cf. Vázquez Rios v. Hernández Colón*, 815 F.2d 830 (1st. Cir. 1987).

state of the federal law on this matter, *Juarbe*, 821 F.2d at 14, because "they go further than do most circuit and district court interpretations of *Elrod-Branti* in refusing to allow political firings at the higher levels of government." *Rodriguez Rodriguez v. Muñoz Muñoz*, 808 F.2d 138, 142 (1st Cir.1986).

The court of appeals has correctly pointed out that the Puerto Rican opinions frame the *Branti* issue in terms of "whether a position requires loyalty with a party's 'ideological axioms' ", *Jiménez Fuentes*, 807 F.2d at 243 n.9, which is contrary to *Elrod*'s and *Branti*'s holdings that political firing is constitutional when it serves the interests of the government, not a party organization. *Id.* at 240 and 240 n. 7. Under *Branti*, the proper inquiry is "whether the position related to partisan political interests or concerns." *Id.* at 243 n. 9. *Branti*, 445 U.S. at 519. For this reason, Puerto Rican law seems to afford a narrower exception for political dismissals.

The reason for the greater protection afforded by the Puerto Rican decisions is clear. Puerto Rico's highest court is interpreting the Constitution of Puerto Rico, and that court has always considered the Commonwealth's Constitution to provide a broader protection of civil rights than that afforded by the Constitution of the United States. *Accord, Estado Libre Asociado v. Hermandad de Empleados*, 104 P.R. Dec. 436, 440 (1975).

In sum, at most what the decisions of the Supreme Court of Puerto Rico reveal is that the First Circuit and Puerto Rico's highest tribunal may have reached differing results on the basis of their independent interpretation of different legal texts. It is not a matter of a double standard, as petitioner argues, but of

independent legal doctrines, one federal and one commonwealth, a not infrequent nor surprising occurrence in our federalism. Such divergence is too slender a reed on which to base a petition for certiorari. The petition should be denied.

III. "The First Circuit's Rejection of Commonwealth Law as the Basis to Determine Qualified Immunity from Liability Under 42 U.S.C. § 1983 Is Consistent with this Court's Decision in *Davis v. Scherer*.

Petitioner's argument that the First Circuit erred when it granted respondent qualified immunity in spite of the clearly established Puerto Rican law, flies in the face of this Court's decision in *Davis v. Scherer*, 468 U.S. 183, 193-96 (1984). Petitioner seems to forget that he is suing under 42 U.S.C. §1983 that protects only against violations of federally protected rights. *See, Monroe v. Pape*, 365 U.S. 167 (1961); *Casines v. Murchek*, 766 F.2d 1494, 1501 n. 10 (11th Cir. 1985). He also forgets that the only federally protected right he claims is a First Amendment protection from a politically based dismissal. *Juarbe*, 831 F.2d at 12. Under such set of facts, and according to *Davis*, respondent cannot be denied qualified immunity even if Commonwealth law was clearly established.

Davis indicates that unless the rights which form the basis of the plaintiff's civil rights claims were conferred by state law, a violation of state law is neither cognizable under section 1983 nor results in the forfeiture of immunity for the alleged violation of rights which have independent constitutional origin. *Davis*, 468 U.S. at 193-94, 194 n. 12. Petitioner's submission, if adopted, would disrupt the balance that this Court's decisions strike "between the interests

in vindication of citizens' constitutional rights and in public officials' effective performance of their duties." *Id.* at 195. "It would become more difficult, not only for officials to anticipate the possible legal consequences of their conduct, but also for trial courts to decide frivolous suits without protracted litigation, " *id.* at 196, as they would have to become enmeshed in questions about the meaning or purpose of state law, that are often impossible to be resolved on summary judgment. Petitioner's submission should be rejected.

IV. "The First Circuit's Decision Upholding Respondent's Qualified Immunity Is Clearly Consistent with this Court's Decisions.

The court of appeals decision in this case represents a correct application of the qualified immunity doctrine established by *Harlow* and its progeny. Judge Breyer's well reasoned opinion for the court speaks for itself and needs no elaboration at this point. However, we would like to call the Court's attention to two significant points that lend support to our opposition to the grant of certiorari in this case.

First, petitioner's argument fails to recognize that *Elrod* and *Branti* marked a substantial change in the law, *De Abadia*, 792 F.2d at 1191. As is often the case, such change gives rise to a process of sharpening the lines in the law's grey areas that result from such change. *Id.* at 1190-91. In *Branti*, the Court set forth the law in highly general terms. It said that the Constitution provided protection from politically-based dismissal to public employees, but *excepted* from such protection those jobs where "party affiliation is an appropriate requirement for the effective performance of the public office involved." *Branti*, 445 U.S.

at 518. But, the Court did not specify just where "party affiliation" was , or was not, "appropriate." It was difficult to predict just how the courts, in particular instances, would draw the line that the Supreme Court described in *Branti*—"a line that seeks to separate instances where (1) a newly elected political party can legitimately replace those who hold important offices in order to carry out its electoral mandate and to provide voters with the confidence it is doing so, . . . from (2) pure political patronage. . . ." *Juarbe*, 831 F.2d at 13. In sum, after *Branti*, a public official, such as respondent here, would find it extremely difficult to anticipate when his decision to dismiss a high level employee would give rise to liability for damages for a violation to a federally protected right. This is the exact situation qualified immunity is designed to protect against. *See Davis*, 468 U.S. at 195, *Harlow*, 457 U.S. at 818-19; *Butz v. Economou*, 438 U.S. 478, 506-7 (1978). The decision in *Juarbe* is a correct recognition of this fact.

Even if one were to accept, *arguendo*, petitioner's contention that the opinions of the Commonwealth Supreme Court represent authoritative interpretations of federal law, his argument must still be rejected. Petitioner's contention fails to consider the considerable body of case law from circuit courts of appeal and district courts that are contrary to the Commonwealth court's opinions. This corpus, when considered together with such opinions, adds to the uncertainty that a reasonable public official would have to face. Federal courts have been reluctant to define *Branti*'s exception too narrowly "lest they prohibit newly elected officials from implementing new policies in areas" that sound technical, but which,

"depending on time and circumstances, may become politically charged." *Juarbe*, 831 F.2d at 13. *See Tomczak v. City of Chicago*, 765 F.2d at 641. A fair reading of this body of case law, including the Commonwealth court's decisions, leads to the firm conviction that in 1985 there was very little, if any, "clearly established law" in this area.[6]

Second, the First Circuit's decision evidently, has been guided by a "practical sense for the political-governmental system in operation," *Ecker v. Cohalan*, 542 F. Supp. at 901, that allowed it to recognize the crucial role a regional director plays in the structure of the government of the Commonwealth of Puerto Rico.

In Puerto Rico, contrary to the situation existing in the states, all of the primary functions of the government have been entrusted to the Commonwealth government by the Constitution of Puerto Rico. *See* P.R. Const. art. IV; P.R. Laws Ann. tit. 3, §§ 1-451 (1982). The Commonwealth government provides all important services to the people, such as police and fire protection, public schools and universities, hospitals, transportation, including carriage of goods by

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[6] To aid the Court we have included as an addendum to this brief a list of federal court cases interpreting the *Branti* exception. It shows that through 1985, lower courts applied *Branti*'s exception broadly, finding protection against politically based dismissals only for highly technical or very low level jobs, such as a road grader operator, a bookkeeper; but that protection was usually denied to high level and middle level employees. Particularly lacking the requisite clarity in the law were those cases involving the "troublesome middle tier" of the *Elrod-Branti* spectrum. *See, De Abad'a*, 792 F.2d at 1194 (Campbell, C.J. concurring).

sea, libraries, all public utilities, such as electricity, telephone, water and sewage services, not to say housing, welfare and other social services, industrial and agricultural development and production, and so on. About the only thing the Commonwealth government does not do is pick-up the garbage, which is a function traditionally entrusted to the municipal governments. In short, in Puerto Rico the government at the state level has been entrusted with those functions that in the United States are usually in the hands of local government units, such as counties or municipalities. *See, e.g., Tomczak v. City of Chicago*, 765 F.2d at 641.

In the United States, the issue in this type of case arises in the context of much simpler government structures, usually below the state level. *See, e.g., Soderbeck v. Burnett County*, 752 F.2d 285, 288 (7th Cir.), *cert. denied*, 471 U.S. 1117 (1985) (the sheriff's confidential secretary); *Nekolny v. Painter*, 653F.2d 1164, 1169-70 (7th Cir. 1981), *cert. denied*, 455 U.S. 1021 (1982) (senior citizens' coordinator of township may qualify as policymaker); *Ness v. Marshall*, 660 F.2d 517, 520-23 (3d Cir. 1981) (city solicitor and assistant city solicitor were policymakers); *Ecker v. Cohalan*, 542 F. Supp. 896, 900-03 (E.D.N.Y. 1982) (chief deputy commissioner of parks was both a policymaking and confidential employee). Also, one should not forget that in the United States many of the regional, municipal and other local government units are headed by elected officials. In Puerto Rico a radically different situation exists, as the only elected official of the executive branch is the Governor, and there are no elected officials at the regional level. Therefore, any newly elected Governor must rely ex-

clusively on appointed officials in order to put his party's program into effect.

Most agencies of the Commonwealth government, such as the PBA in this case, are decentralized and perform many functions at a regional level. The agency's regional directors are responsible for planning, coordinating, and managing the agency's programs at the regional level. They supervise a regional staff that may range to dozens employees, as happens in this case. Such positions are the natural source for influential recommendations of changes in policy, and act widely as public speakers and educators regarding the state programs, thereby serving as pipeline and advocates at the municipal and regional level. In short, the position of regional director is an indispensable component in the structure of the government of the Commonwealth.

Given the functions and importance the position of regional director involved in this case, as compared to those of the many positions found by numerous federal courts to be subject to the *Branti* exception, the First Circuit's conclusion that the law was anything but clearly established regarding the illegality of respondent's conduct, was eminently correct. Review by this Court is unnecessary.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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ADDENDUM

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"The Spectrum of Public Employment From the Point of View of Political Dismissal Cases in the Federal Courts.

(From *Illinois State Union Council v. Lewis*-1972 to *Jiménez Fuentes v. Torres Gaztambide*-1986)

I. The following cases illustrate the lower part of the spectrum wherein the courts found the employees' positions involved protected from politically based dismissal:

A. In cases involving sheriffs' employees: *Elrod v. Burns*, 42 U.S. 347 (1976) (Chief Deputy, Process Division, Supervisor, 7th fl. Sheriff Dept. Bailiff and Security Guard, Cook County Juvenile Court, Process Server, employee); *Mcbee v. Jim Hogg Cty. Texas*, 730 F.2d 1009 (5th Cir. 1984) (Deputy Sheriff, Dispatcher, Dispatcher Secretary); *Jones v. Dodson*, 727 F.2d 1320 (4th Cir. 1984) (Deputy Sheriff, Dispatcher); *Owens v. Rush*, 654 F.2d 1370 (10th Cir. 1981) (Under Sheriff); *Barrett v. Thomas*, 649 F.2d 1193 (5th Cir. 1981) (Sargent in the Criminal Investigation Division); *Tanner v. McCall*, 625 F.2d 1183 (5th Cir. 1980) (Deputy Sheriff Secretary); *McCollum v. Stahl*, 479 F.2d 869 (4th Cir. 1978) (Deputy Sheriff); *Ramey v. Harber*, 431 F. Supp. 657 (D.W.D. Va. 1977) (Deputy Sheriff).

B. Cases involving lawyers: *Branti v. Finkel*, 445 U.S. 507 (1980) (County Assistant Public Defenders).

C. Cases involving technical or low level positions: *Shondel v. McDermott*, 775 F.2d 859 (7th Cir. 1985) (Receptionist); *Horton v. Taylor*, 767 F.2d 471 (8th Cir. 1985) (Road Grader Operator); *Grossart v. Di-*

naso, 758 F.2d 1221 (7th Cir. 1985) (Bookkeeper); *Barnes v. Bosley*, 745 F.2d 501 (8th Cir. 1984) *cert. denied*, 471 U.S. 1017 (1985) (Three(3) Deputy Circuit Clerks of St. Louis City); *Nekolny v. Painter*, 653 F.2d 1164 (7th Cir. 1981) (Bus Driver, Secretary Dispatcher); *Illinois State Union v. Lewis*, 473 F.2d 561 (7th Cir. 1972) (94 employees of diverse nature e.g. elevator operators; janitors, secretaries, etc.); *DeLa Cruz v. Pruitt*, 590 F. Supp. 1296 (N.D. 2nd. 1984) (Supervisor of branch of auditor's office); *Miller v. Board of Education*, 450 F. Supp. 106 (D.W. Va. 1978) (School Principal, Bus Drivers for the Board of Education, Bus Drivers, Lubrication Boy, Cooks).

II. There are some cases that fall within the middle tier of the spectrum:

A. Cases including sheriffs' employees: *Mele v. Fahy*, 579 F. Supp. 1576 (D.NJ. 1980) (Police Director); *Joyner v. Lancaster*, 553 F. Supp. 809 (D.M.D.N.C. 1982) (Captain in the Sheriff's Office).

B. Cases involving other positions: *Meeks v. Grimes*, 779 F.2d 417 (7th Cir. 1985) (Bailiffs of the Gary City Court of Indiana); *Soderbeck v. Burnett Cty. of Wisconsin*, 752 F.2d 285 (7th Cir. 1985) (Not Confidential Secretary); *Stegmaier v. Trammell*, 597 F.2d 1027 (5th Cir. 1979) (Deputy Circuit Clerk).

III. The higher part of the spectrum consists of the cases where the courts have found that the following positions are subject to removal based on their political affiliation:

A. Cases involving lawyers: *Livas v. Petka*, 711 F.2d 798 (7th Cir. 1983) (Assistant State Attorney); *Mummau v. Ranck*, 687 F.2d 9 (3d Cir. 1982) (Assistant State Attorney); *Ness v. Marshall*, 660 F.2d

517 (3d Cir. 1981) (City Solicitor, Assistant City Solicitor); *Newcomb v. Brennan*, 558 F.2d 825 (7th Cir. 1977) (Deputy City Attorney); *Alfaro de Quevedo v. de Jesús Schuck*, 556 F.2d 591 (1st Cir. 1977) (Director Office of Criminal Justice, Department of Justice of P.R.); *Bavoso v. Harding*, 507 F. Supp. 313 (D.S.D.N.Y. 1980) (City Corporation lawyer).

B. Cases involving state directors: *Awtry v. U.S.*, 684 F.2d 896 (Ct. Cl.. 1982) (State Executive Director of Agricultural Stabilization and Conservation Service); *Committee to Protect First Amendment Rights v. Bergland*, 626 F.2d 875 (D.C. Cir. 1979), *cert. denied*, 447 U.S. 921 (1980) (State Director FHMA, State Director of Agricultural Stabilization and Conservation Service); *Brunton v. United States*, 518 F. Supp. 223 (S.D. Ohio 1981) (State Director of FmHA)

C. Other miscellaneous cases: *Jiménez Fuentes v. Torres Gaztambide*, 807 F.2d 236 (1st Cir. 1986) (Regional Director of the Urban Development and Housing Corporation); *Brown v. Trench*, 787 F.2d 163 (3d Cir. 1986) (Assistant Director of Public Information for Bucks County); *Tomczack v. City of Chicago*, 765 F.2d 633 (7th Cir.) *cert. denied* 474 U.S. 946 (1985) (First Deputy Commissioner of the Dept. of Water); *Shackman v. Democratic Organization of Cook County*, 722 F.2d 1307 (7th Cir. 1983) (City Park Superintendent of Employment); *Sweeney v. Board*, 669 F.2d 542 (8th Cir.) *cert. denied*, 459 U.S. 878 (1982) (fee agents); *Nekolny v. Painter*, 653 F.2d 1164 (7th Cir. 1981) (Senior Citizens Coordinator); *Shaw v. U.S.*, 640 F.2d 1254 (U.S.C.C. 1981) (Deputy Assistant Secretary of Defense); *Norbeck v. Davenport*, 545 F.2d 63 (8th Cir. 1976) (School Principal); *Rivera Morales v. Benitez de Rexach*, 541 F.2d 882 (1st Cir. 1976) (As-

sistant Secretary of Education); *Indiana State Employees Ass'n v. Negley*, 501 F.2d 1239 (7th Cir. 1974) (Employees of the Indiana Dept. of Instruction. e.g. consultants and coordinators for Federal Projects); *Ecker v. Cohalan*, 542 F. Supp. 896 (E.D.N.Y. 1982) (Chief Deputy Commissioner of Parks, Conservation and Recreation); *Besig v. Friend*, 460 F. Supp. 134 (N.D.Ca. 1978) (Member of City Recreation and Park Comm'n); *Gould v. Walker*, 356 F. Supp. 421 (N.D.Ill. 1973) (Assistant Directors and Coordinators for Special Education for the Governor's Office of the state of Illinois).